TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 179

HERBERT S. DANIEL, TRUSTEE OF PETERS TRUST COMPANY, BANKRUPT, PETITIONER,

vs.

GUARANTY TRUST COMPANY OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 23, 1931

CERTIORARI GRANTED OCTOBER 19, 1931

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[fol. a] [Captions omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

In Bankruptcy. #4260

In the Matter of Peters Trust Company, Bankrupt

Application and Petition for Reclamation by Guaranty Trust Company—Filed May 15, 1930

Comes now the Guaranty Trust Company, a corporation, and for its petition of reclamation, alleges as follows:

1. That your petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and having its principal place of business in the City of New York and State of New York; that the Peters Trust Company is a banking corporation organized under the laws of the State of Nebraska, with its principal place of business in Omaha, Nebraska.

2. On November 23, 1929, said bankrupt, Peters Trust Company, submitted a report to the Department of Trade & Commerce of the State of Nebraska, showing an insolvent financial condition and a resolution declaring that its capital was impaired and that the corporation was insolvent; that on November 25, 1929, two days later, the Department of Trade & Commerce filed its petition in the above case, asking that it be appointed liquidating agent and that on [fol. 2] November 25, 1929, a decree was signed by the court with the consent of said bankrupt, Peters Trust Company, appointing the Department of Trade & Commerce as liquidating agent as provided in House Roll #249, Chapter #38, of the Session Laws of Nebraska 1929, said decree stating that said Department should be vested with title to all of the assets of said bankrupt, Peters Trust Company.

3. Your petitioner further shows that on or about the 18th day of November 1929, said Peters Trust Company, while insolvent, and knowing full well their insolvency, ordered from the Guaranty Company of New York, certain

bonds which they purchased from said Guaranty Company of New York, said bonds together with the dates shipped, the amount and their registry number, are as follows:

$5,000 Canadian National Ry.; Registry #90772; shipped November 20, 1929.

$8,000 Texas Corporation convertibles 5's, 1944; Registry #791,206; shipped November 21, 1929.

$5,000 New York, Chicago & St. Louis R. R. 6's, 1932; Registry #790,909; shipped November 21, 1929.

$5,000 Canadian National Ry.; Registry #773,005; shipped November 23, 1929.

4. That said bonds, as described above, were sent to the Peters Trust Company in the regular course of the mails, under registered mail, and delivered to and received by said Peters Trust Company approximately two days after the date of shipment, to-wit: November 23 and November 25, 1929. That the bonds shipped on November 20, 1929 and November 21, 1929 were delivered to and received by said Peters Trust Company on the same day the said Peters Trust Company passed the resolution admitting insolvency and the last shipment of said bonds was delivered to and received by said Peters Trust Company after the Department of Trade & Commerce had been appointed liquidating agent by the court.

5. Your petitioner further alleges that the Peters Trust Company never intended to pay for said bonds; that the Peters Trust Company officers knew that they were hopelessly insolvent and were unable to meet their just obligations and debts, and if they did not know it, they should have known it. That the Peters Trust Company has paid nothing of value for said bonds and never intended to do so, and the said — to the Peters Trust Company, is a nullity [fol. 3] and no valid title passed to the Peters Trust Company of said bonds as the said bonds were obtained upon the implied and express representation that Peters Trust Company was solvent, whereas it was hopelessly insolvent and the officers of the Peters Trust Company knew so when they ordered and received said bonds. That neither the Guaranty Company of New York nor the Guaranty Trust Company were aware of the insolvent condition of this said bankrupt, Peters Trust Company.

6. That the agreement and understanding between Peters Trust Company and the Guaranty Company of New York; was that said sale of bonds was to be a cash sale and that the purchase price for said bonds was to be paid to the Guaranty Company of New York by the Peters Trust Company immediately upon receipt of said bonds. That the sale of bonds throughout the entire country between financial houses is always on a cash basis and the prevailing custom and usage is and always has been a sale for immediate cash.

7. Your petitioner relied upon the financial statements of Peters Trust Company as to their financial condition and these statements together with the agreement to pay cash for the bonds induced the Guaranty Company of New York to sell and deliver said bonds at the dates set forth.

8. Your petitioner further alleges that on the dates said bonds were shipped by the Guaranty Company of New York, said Guaranty Company of New York, sold, assigned and set over to your petitioner, Guarantee Trust Company, for a valuable consideration, the accounts against the said Peters Trust Company for said bonds, and your petitioner is now the owner of said bonds.

9. That said bonds are now in the possession of Herbert S. Daniel, Trustee in bankruptcy of said Peters Trust Company, and that no part of said purchase price has been paid by said Peters Trust Company or by said Herbert S. Daniel, trustee in Bankruptcy of said Peters Trust Company, for said bonds. Petitioner claims that title never passed to the Peters Trust Company or to said Herbert S. Daniel, Trustee, but is in the Guaranty Trust Company, your petitioner. That said Herbert S. Daniel, Trustee, is holding these bonds contrary to law and that he should immediately surrender them over to the rightful owner, your petitioner.

10. That before the commencement of this proceeding due demand was made by your petitioner upon the Depart- [fol. 4] ment of Trade & Commerce, as liquidating agent, that it deliver possession of said bonds to your petitioner, but said demand has been refused.

Wherefore your petitioner prays that an order be entered instructing and directing, Herbert S. Daniel, Trustee of said Peters Trust Company, Bankrupt, to deliver to your

petitioner the bonds described above and that your petitioner have such other and further relief as may seem just and proper.

The Guaranty Trust Company, Petitioner, by Baldrige, Dorsey & Baldrige, Its Attorneys.

Duly sworn to by H. Malcolm Baldrige. Jurat omitted in printing.

[File endorsement omitted.]

Filed Apr. 2, 1930, B. H. Dunham, Referee.

IN UNITED STATES DISTRICT COURT

In the Matter of PETERS TRUST COMPANY, Bankrupt

ANSWER OF HERBERT S. DANIEL, TRUSTEE IN BANKRUPTCY—Filed May 15, 1930.

Now comes Herbert S. Daniel, the duly qualified and acting Trustee of the Peters Trust Company, Bankrupt, and for an answer to the application and petition for reclamation by the Guaranty Trust Company of New York, alleges as follows:

1. Denies each and every allegation contained in said application and petition not expressly admitted.

[fol. 5] 2. Alleges that for a long time prior to November 1929, the Peters Trust Company had purchased bonds and securities from the Guaranty Company of New York, and to effect said purchase, would place an order for the said securities either by wire or by mail, and said Guaranty Company of New York, would fill said order, and ship the securities by registered mail to the Peters Trust Company enclosing an itemized statement of the amount due for the purchase price of said securities. Peters Trust Company after receiving the said securities, would then pay for the same by drawing check in favor of the Guaranty Company of New York, and mail it to said Company. Securities were

thus purchased on credit from time to time for Peters Trust Company's own account or to fill orders for its various customers.

3. That on November 18th, 1929, or prior thereto, the Peters Trust Company ordered the securities listed in said application, from the Guaranty Company of New York, and the said securities were sent by registered mail to Peters Trust Company and received by Peters Trust Company as indicated by the following tabulation:

Date mailed	Date received	Security	Purchase price
11-20-29	11-22-29	5,000 Par Canadian Nat'l.....	$4,975.69
11-21-29	11-23-29	5,000 New York, Chicago & St. Louis R. R. Notes	5,033.33
11-21-29	11-25-29	8,000 Texas Corporation 5%.....	8,071.11
11-23-29	11-25-29	5,000 Canadian National 5%.....	4,975.69

Enclosed in each of the above shipments, was a form letter or statement, setting out the total purchase price substantially as follows:

"Peters Trust Company, Omaha, Nebraska:

We send you herewith by registered mail insured, the following securities. Please sign officially and return this form of acknowledgment and oblige.

Yours very truly, Guaranty Company of New York,
by —— ——, Salesman. Office.

[fol. 6] The following was then an itemized statement of the securities, and the purchase price followed by the statement:

"Please remit to Guaranty Company of New York, 120 West Adams St., Chicago, Illinois, Exchange in amount of $— (purchase price filled in in each case), in payment for the enclosed, per above statement."

4. For further answer the trustee alleges that the title to the said securities vested in Peters Trust Company, and denies that there was any agreement or condition that the title to said securities should not vest prior to the payment of the same.

5. The trustee especially denies that Peters Trust Company was guilty of any fraud in ordering the said securities, or in placing the said order did not intend to pay for the

same, or that it made any false or fraudulent representations whatsoever to the Guaranty Company of New York, in connection with the purchase of said securities from it. The trustee admits, however, that the said securities have not been paid for and that the said Guaranty Company of New York, or its assignee, is a creditor of [of] the bankrupt estate for the amount of the said purchase price, provided it files a proper claim therefor.

6. Your trustee further denies that the petitioner is entitled to reclaim the said securities.

7. Your trustee further alleges that the following customers of Peters Trust Company, had placed orders with the Peters Trust Company, for the following securities, and had paid a part or the whole of the purchase price, and that the Peters Trust Company had purchased the said securities from the Guaranty Company of New York for the purpose of filling the said orders, to-wit:

Rex Bixby.....	1,000 par	Canadian National 5% Bonds due 10-1-69.
Byrne Foster.....	3,000 "	" " " " " " " "
Mrs. Anna McGlade...	3,000 "	" " " " " " " "
Florence I. Moore.....	1,000 "	" " " " " " " "
Ellen Nash.....	1,000 "	" " " " " " " "
Rev. M. J. Laure.....	1,000 "	" " " " " " " "
R. C. Peters.....	3,000 par	Texas Corporation 5% Gold Debentures due 10-1-44.

Each of the above mentioned customers have made demand upon your trustee for the above mentioned securities, and are claiming a right to the same on the completion of the purchase price, where the purchase price had not been fully paid. On account of said purchase, each of the said cus- [fol. 7] tomers of Peters Trust Company should be made a party to this proceeding, and directed to set out in writing their claim, if any, on the respective securities.

8. Your trustee further alleges, that the Guaranty Trust Company of New York, the petitioner and applicant herein, has in its possession, on deposit, approximately the sum of $31,224.60 which belongs to the bankrupt estate, and which was accumulated by the Receiver and Trustee of said bankrupt estate since the date it was adjudicated bankrupt. The trustee has made due demand upon the petitioners for delivery of the said money, but the Guaranty Trust Company of New York has refused to deliver the

said funds or any part thereof, and should be required to account for all funds collected by it on behalf of the receiver or trustee of Peters Trust Company, Bankrupt, or the bankrupt estate, and be directed to deliver the same forthwith to Herbert S. Daniel, Trustee.

IX. The trustee further alleges that with full knowledge of all the facts alleged in the applicant's petition, the applicant ratified and confirmed the sale of the said securities by attempting to impress a lien on the funds belonging to the bankrupt estate on deposit with the applicant, and is estopped to now reclaim said securities from the undersigned trustee.

Wherefore your trustee respectfully prays that the petition of the Guaranty Trust Company of New York, for reclamation of the above mentioned securities, be set down for hearing, and notice of said hearing be given to:

Rex Bixby, % Bankers Reserve Life Co., Omaha, Nebr.;
Byrne Foster, Scribner, Nebraska;
Mrs. Anna McGlade, 611 So. Bench St., Galena, Ill.;
Florence I. Moore, % J. P. Moore, 306 Peters Trust Bldg., Omaha, Nebraska;
Ellen Nash, 2217 So. 32nd Ave., Omaha, Nebr.;
Rev. M. J. Laure, Oakland, Nebraska;
R. C. Peters, 2nd Fl. Peters Trust Bldg., Omaha, Nebr.,

and said parties be directed to set forth in writing prior to the date of said hearing, whatever interest they may have or claim in or to the said securities, and that on said hear-
[fol. 8] ing, the petition of the Guaranty Trust Company of New York for reclamation be denied, and the rights of each of the said customers of Peters Trust Company in and to the said securities be determined and adjudicated, and your trustee be directed as to the delivery of the said securities.

The trustee further prays for an order directing the Guaranty Trust Company of New York to account to him for all funds collected or now held by it belonging to the bankrupt estate, and be ordered to deliver the same [for--

with] to your trustee, and for such other relief as to the Court may seem just and equitable.

Dated this 3rd day of April, 1930.

Herbert S. Daniels, Trustee.

Filed Apr. 3, 1930. B. H. Dunham, Referee.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

In Bankruptcy. Case No. —

In the Matter of PETERS TRUST COMPANY, Bankrupt

Voluntary Petition

Transcript of Proceedings upon the Petition for Reclamation by the Guaranty Trust Company of New York, the Answer of the Trustee Thereto, and Claims of Interveners, Anna McGlade, et al.—Filed May 15, 1930

At 501 Securities Building, in the City of Omaha, Douglas County, Nebraska, in said District, Before B. H. Dunham, Referee in Bankruptcy, April 25, 1930

Appearances:

Mr. H. M. Baldrige, Attorney for Petitioner.
Mr. A. F. Mullen, Mr. W. B. Lane, Attorneys for Trustee.
Mr. Herman Aye, Mr. A. E. Royce, Attorneys for Interveners.

MOTION TO STRIKE

Mr. Baldrige: Comes now the Guaranty Trust Company of New York, applicant herein, and moves that there be [fol. 9] stricken from the answer of Herbert S. Daniel, trustee, paragraphs seven and eight, for the reason that this pertains to an entirely separate issue.

Amendment to Answer

Mr. Lane: Before you present that motion, I want to say that I noticed in studying over my answer last night, I had not alleged an election of ratification of the contract which is raised by the other answers. I dictated it over the telephone, and it will be here shortly.

The Referee: Leave to amend the answer by attaching paragraph is granted.

Mr. Lane: It is paragraph nine, which reads as follows: "The trustee further alleges that with full knowledge of all the facts alleged in the applicant's petition, the applicant ratified and confirmed the sale of said securities by attempting to impress a lien on the funds belonging to the bankrupt estate on deposit with the applicant, and is estopped to now reclaim said securities from the undersigned trustee."

Mr. Baldrige (continuing motion): This motion is for the reason as stated, that the paragraphs of the trustee's answer referred to, raise an issue entirely separate and distinct from the issue raised in the petition for reclamation, and the court has no jurisdiction to entertain such separate issue. I would like a definite ruling now on this motion to strike.

Order Overruling Motion to Strike

The Referee: I will overrule the motion.

Mr. Baldrige: We will file a dismissal of this reclamation proceeding. In other words, from the very first our position has been that it has been immaterial whether we keep the money in New York under the collateral pledge agreement, or whether we get the bonds. Now if Mr. Daniel, the trustee, is allowed to come in here and in his answer bring up these different issues, and if these other people are allowed to come in this lawsuit, as far as we are concerned, why we will dismiss the action. Now of course there isn't any counterclaim, this isn't the same as a counterclaim because we are merely asking for the custody of the bonds. Mr. Daniel has no right to come in when we ask for the custody of the bonds, and bring up a new issue.

The Referee: Well, I am not so sure about that.

Mr. Royce: If the Court please, I think it is the equivalent of a counterclaim that has been filed, and if a counterclaim, a man can't dismiss an action because the counterclaim is the claim of others to these bonds.

[fol. 10] Mr. Baldrige: The Guaranty Trust Company by its attorneys aren't interested in this proceeding. We do not believe we are in court, and we are not interested to stay.

The Referee: All right.

Mr. Lane: We will excuse you, and have the order entered.

HERBERT S. DANIEL, called on behalf of trustee, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lane:

Q. Your name is Herbert S. Daniel?

A. Yes, sir.

Q. You are the duly appointed, qualified and acting trustee of Peters Trust Company, bankrupt?

A. Yes, sir.

Q. And were also the receiver of the Peters Trust Company, bankrupt, from the date of your appointment, December 10th, 1929, to the appointment of the trustee on March 17th, 1930?

A. Yes, sir.

Q. And have been in active charge of the affairs of the bankrupt estate, in possession of the assets, since the 24th day of December, 1929?

A. Yes, sir.

Q. And are still in possession?

A. Yes, sir.

Q. Now referring to the matter of the Guaranty Trust Company of New York, I will ask you whether or not you, as representative of the estate of the Peters Trust Company, bankrupt have had some dealings with that company?

A. Yes, sir.

Q. State in general the nature of the transactions between yourself and the Guaranty Trust Company, in a general way.

A. I wired the Guaranty Trust Company to wire me the balance on hand belonging to the Peters Trust Company with that bank. They answered by saying that the information I desired was in the hands of their Omaha attorneys. I called up Baldrige, Dorsey and Baldrige's office, and read them the telegram I sent the Guaranty Trust Company and their reply, and asked for the information.

Q. Did they say in their telegram who their attorneys were, or did you know?

A. I knew their attorneys were Baldrige and Dorsey because they had filed the application before that.

The Referee: The application for reclamation?

The Witness: Yes.

[fol. 11] Q. Had Baldrige and Dorsey also been over to see you in regard to the affairs of the Guaranty Trust Company prior to that time?

A. Baldrige had, several times.

Q. And there was also a man named Curtis, from the Guaranty Trust Company, here prior to that time, and stated that Mr. Baldrige was looking after their affairs?

A. Yes sir.

Q. In response to the request for a statement of the amount on deposit, did you obtain such a statement from Baldrige and Dorsey?

A. Later I wired the Guaranty Trust Company for a copy of the statement of the Peters Trust Company account from the 25th day of November to date, and they wired me back that that statement had been mailed to their Omaha attorneys for transmission to me, and I went over to Baldrige and Dorsey's office the morning they got the statement from the Guaranty Trust Company, and Mr. Dorsey delivered the statement to me.

Q. Showing you now the statement marked Exhibit A, being a statement in two sheets, I will ask you if you can identify that as the statement you received from Mr. Dorsey at that time?

A. Yes.

Q. And that was in response to your request for a statement of the balance and deposits made in the Guaranty Trust Company from November 25th, to date?

A. Yes.

Q. And that shows a balance of——

A. $31,224.60.

Q. Have you since that time drawn a draft on the Guaranty Trust Company for any part of that deposit?

A. Prior to the receipt of this statement, I drew a check on the Guaranty Trust Company in favor of the Omaha National Bank, for this amount.

Q. I mean when you withdrew $7500.

A. Since then, since the receipt of this statement, I drew a check on the Guaranty Trust Company in favor of the Omaha National Bank, transferring that amount of the funds to the Omaha National Bank.

Q. So the balance that you now have to your credit down there would be the $31,224.60 less than $7500 you have since withdrawn?

A. Yes, that is correct.

Q. That check has been duly honored by the Guaranty Trust Company?

A. I understand so.

Q. Now will you state to the court briefly the source of the funds that made up this deposit now in the hands of the Guaranty Trust Company?

[fol. 12] A. It represents payments made by the Prudential Insurance Company for mortgages sent on by the Peters Trust Company. Payments were made by the Prudential Insurance Company and credited to our account in the Guaranty Trust Company since February 13th, 1930.

Q. On November 25th, 1929, from the statements they have sent you, I will ask you whether or not the Guaranty Trust Company set off and disposed of the balance on hand at that time?

A. The balance to the credit of the Peters Trust Company on November 25th, 1929, was applied by the Guaranty Trust Company against an indebtedness owing by the Peters Trust Company to them at that time.

Q. So the moneys that have accumulated, have accumulated entirely since the adjudication in bankruptcy and the appointment of yourself as receiver or trustee?

A. Yes sir.

Q. Does Exhibit A correctly set out the source of the moneys now on deposit at the Guaranty Trust Company?

A. No, it does not show the source.

Q. I will withdraw that question, and make another statement. Referring to Exhibit A, on the first page, in column two, appears the names of the various mortgages followed by the various amounts. I will ask you what those names refer to?

A. Those are the names of the mortgagors on the loans that were sent in to the Prudential Insurance Company, and which were accepted by them, and the moneys in payment for them were paid to the Guaranty Trust Company for the Peters Trust Company.

Q. The items shown under the column "Credits" represent the moneys paid by the Prudential Insurance Company of America to take up the loans just referred to?

A. Yes sir.

Q. And were there any moneys from any other sources deposited in the Guaranty Trust Company since the date of adjudication in bankruptcy except from the loans sold to the Prudential Insurance Company of America?

A. No sir.

Examination by Mr. Mullen:

Q. Mr. Daniel, you understand this whole arrangement between the Peters Trust Company and this claimant, do you, Guaranty Trust Company?

A. Yes sir.

Q. Have any adverse claims been made to you for any of these amounts?

A. No sir.

Q. From your examination of the books and records of the Peters Trust Company, from the correspondence you [fol. 13] have had with the Guaranty Trust Company, or communications with their attorneys, has the Guaranty Trust Company made any claim for any moneys due them for any transactions they had with the Peters Trust Company?

A. No sir.

Q. And all advances that the Prudential Insurance Company had made, I mean all advances the Guaranty Trust Company had made on the mortgages cleared through them for the Prudential Insurance Company, have been fully paid?

A. They were fully paid for on February 13th, 1930.

Q. And the balance that now appears on deposit is the mortgages that have cleared since that time?

A. Yes sir.

Q. With the accrued interest thereon?

A. Yes sir.

Mr. Royce: Do they still have other mortgages down there?

A. No.

J. J. JACKLEY, called on behalf of trustee, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lane:

Q. You may state your name to the reporter?

A. J. J. Jackley.

Q. And were you in the employ of the Peters Trust Company prior to their closing on November 25th?

A. I was.

Q. In what capacity?

A. Bookkeeper.

Q. And had you been so employed for some time?

A. Yes sir.

Q. Approximately how long?

A. Five years.

Q. And as bookkeeper, did you have immediate charge of keeping the records of deposits and credits and transactions of the Peters Trust Company with various parties, including the Guaranty Trust Company of New York?

A. I did.

Q. And did you also have charge of checking the bank accounts and bank statements?

A. I didn't check the bank accounts, but I was very familiar with them.

Q. Did they all go over your desk?

A. They didn't go over my desk, but I have been checking them since and find them correct.

Q. Now referring to the paper which I show you, marked Exhibit B, I will ask you whether or not that is the statement received from the Guaranty Trust Company showing the deposits and charges against the account of the Peters

Trust Company from November 21st down to November 25th?

[fol. 14] A. It is.

Q. And this was received in the regular course of business by the Peters Trust Company and the agents in charge since that time?

A. Yes.

Q. And I will ask you whether you have also been employed by the receiver and trustee of the Peters Trust Company, Herbert S. Daniel.

A. I have.

Q. Have you checked the books and records of the Peters Trust Company to know whether or not there is any indebtedness at this time due from the Peters Trust Company to the Guaranty Trust Company of New York?

A. There is not.

Q. And you have so determined from your examination of the books? A. Yes sir.

Mr. Lane: I think that's all.

(Witness dismissed.)

M. D. Cameron, called on behalf of trustee, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lane:

Q. You may state your name?

A. M. D. Cameron.

Q. What official capacity, connection, did you have with the Peters Trust Company?

A. I was vice president.

Q. And had you so been for some time?

A. Since the organization of the company.

Q. And you were directly connected with the company during the entire month of November, 1929?

A. Yes sir.

Q. I will ask you whether or not you had occasion to be in New York on November 26th, 1929?

A. I was.

Q. And did you call at the office of the Guaranty Trust Company of New York at that time?

A. I did.

Q. And did you talk with any of the officers or men in charge of that organization?

A. I did.

Q. Name one or two.

A. Mr. Curtis, vice president of the Guaranty Trust Company.

Q. At that time did you inform him of the fact that the Peters Trust Company had closed and been taken over by the State?

[fol. 15] A. I did, but they had already been advised.

Q. They had? That was on November 26th?

A. November 26th, in the afternoon.

Q. 1929?

A. Yes sir.

Q. Have you later had correspondence with officers of the Guaranty Trust Company advising them of the fact of the bankruptcy?

A. I have had correspondence, and I also saw Mr. Curtis in our offices a few weeks ago.

Q. You don't recall the exact date of his being here?

A. No, I don't.

Q. That was since the adjudication in bankruptcy?

A. Oh yes.

Q. And you have also seen the attorneys for the Guaranty Trust Company, Baldrige and Dorsey?

A. I have had no occasion to go to see them.

Q. In the office?

A. I have seen them in the office, but I have had no conversation with them.

(Witness dismissed.)

ARTHUR F. MULLEN, called on behalf of trustee, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lane:

Q. Your name is Arthur F. Mullen?

A. Yes sir.

Q. You are a practicing attorney in the State of Nebraska?

A. Yes, sir.

Q. State whether or not you represented the three petitioning creditors of Peters Trust Company, and filed an involuntary petition in bankruptcy in the United States District Court, for the District of Nebraska, Omaha Division, against the Peters Trust Company, on behalf of said creditors?

A. I did, representing three creditors with claims exceeding $500.00, on the 27th day of November, 1929, filed in the United States District Court, District of Nebraska, Omaha Division, an involuntary petition in bankruptcy on behalf of these creditors, and in this suit service was made on the Peters Trust Company, and the matter is still pending.

The Referee: The date of service is not material, is it?

Mr. Lane: Service was made forthwith, wasn't it?

[fol. 16] Mr. Mullen: I don't know what date it was made, but my impression is that service was made that day.

Mr. Royce: That is as I recall it.

Mr. Lane: The subpœna was issued that day, and I think, served the same day. I think that is all. I think that makes the record that we stand on.

The Referee: Now is there anything further bearing upon the claims of people to specific securities here?

Mr. Lane: I think the order should be made directing and authorizing the trustee to deliver the securities mentioned in our answer as being purchased, to the respective purchasers upon the payment of any balance that may be due the bankrupt estate.

Mr. Aye: Right at that point, are there any that haven't paid up in full. As far as I know there may be some others. Laure is one.

The Referee: That applies also as regards possibly Byrne Foster.

Mr. Lane: They have both tendered the money.

The Referee: That is to say they are entitled to the particular securities indicated in the answer of the trustee upon the payment of the balance, if anything, due from them?

Mr. Lane: Correct.

(Examination concluded.)

[File endorsement omitted.]

EXHIBIT A

Peters Trust Co.

Demand Loan Account

	Description of entry		Demand loan Credits	Demand loan Balance
Nov. 25, 1929.			.....	156,700.00
	Lorimer Mtge. paid.....		2,500.00	154,200.00
	Balance applied against loan.....		31,043.53	123,153.47
	Mortgages paid:			
	Bohac, Jr.....	6,000		
	Best	3,000		
	Manz	8,000		
[fo. 17]				
Dec. 2, 1929.	Wells	2,000	72,100.00	51,053.47
	Wiesl	4,500		
	McArdle	2,500		
	Hoffman & Seymour.....	30,000		
	Wenzel	10,000		
	Schaffner, et al.....	2,600		
	Ziegler	3,500		
Dec. 2, 1929.	Interest paid on above Mtges.....		492.36	50,561.11
Jan. 7, 1930.	Mortgages paid:			
	Louis	15,000	21,000.00	29,561.11
	Morrison	4,000		
	Whalen	2,000		
Jan. 7, 1930.	Interest paid on above Mtges.....		213.71	29,347.40
Jan. 23, 1930.	Sila mtge. (6,000) paid.....		6,000.00	23,347.40
Jan. 23, 1930.	Interest paid on above.....		58.75	23,278.65
Feb. 3, 1930.	Mortgages paid:			
	Finnegan	4,600	10,100.00	13,178.65
	Bosse	5,500		
Feb. 3, 1930.	Interest paid on above mtges.....		304.45	12,874.20
Feb. 11, 1930.	Mortgages paid:			
	Burdic	7,000	11,000.00	1,874.20
	Stoural	4,000		
Feb. 11, 1930.	Interest paid on above mtges.....		72.05	1,802.15
Feb. 13, 1930.	Jepson mtge. paid..... 6,500.00			
	146.25 Int.		1,802.15	.....
		6,646.25		
	1,802.15 credited to loan.			
	1,571.90 interest on Demand Loan.		1,571.90	Interest earned on Demand Loan.
	3,374.05			

Excess collateral to loan $3,272.20 against which however there was a charge of $23,055.52 representing a claim transferred from Guaranty Company of New York on November 27, 1929.

Liquidation of Excess Collateral to Loan

(First stated without reference to the claim assigned by Guaranty Company of New York on November 27, 1929.)

	Debits	Credits	Balance	Description of entry
Feb. 13, 1930.	.....	.....	3,272.20	
Mar. 3, 1930.	.....	19,000.00	22,272.20	McNeil Mtge. paid.
Mar. 3, 1930.	.....	354.13	22,626.33	Interest paid on above.
[fol. 18]				
Mar. 4, 1930.	.....	3,500.00	26,126.33	Rush Mtge. paid.
Mar. 4, 1930.	.....	88.34	26,214.67	Interest on above.
Mar. 14, 1930.	.....	5,000.00	31,214.67	Christenson Mtge. paid.
Mar. 14, 1930.	.....	9.93	31,224.60	Interest on above.

Against the above, however, there is a lien on account of claim assigned November 27, 1929, by Guaranty Company of New York of

Principal	23,055.82
Interest on above	385.22
Total Debit	23,441.04
March 14, 1930, Balance due Peters Trust Co.	7,785.56
	31,224.60

In United States District Court

In Bankruptcy. Case No. 4260

In the Matter of Peters Trust Company, Bankrupt

Voluntary Petition

Order of Referee Directing Guaranty Trust Company to Pay Certain Sum to Trustee, etc.—Filed Mar. 15, 1931

At 501 Securities Building, in the City of Omaha, Douglas County, Nebraska, in said District, before B. H. Dunham, Referee in Bankruptcy. April 25th, 1930.

This matter coming on to be heard upon the application of the Guaranty Trust Company for reclamation of the securities therein described, filed herein April 2, 1930, and upon the answer of Herbert S. Daniel, trustee, thereto, filed herein April 3, 1930, and upon the order entered by the undersigned referee April 5, 1930, for notice of the filing of said application of the Guaranty Trust Company, and of the said answer of Herbert S. Daniel, as trustee, thereto, to the following named persons, to-wit:

Rex Bixby, % Bankers Reserve Life Co., Omaha, Nebr.;
Byrne Foster, Scribner, Nebr.;
Mrs. Anna McGlade, 611 So. Bench St., Galena, Ill.;
Florence I. Moore, % J. P. Moore, 306 Peters Trust Bldg., Omaha, Nebr.;
[fol. 19] Ellen Nash, 2217 So. 32nd Ave., Omaha, Nebr.;
Rev. M. J. Laure, Oakland, Nebr.;
R. C. Peters, 2nd Fl. Peters Trust Bldg., Omaha, Nebr.,

which said order ordered and directed the aforenamed persons to set forth in writing whatever interest they, or either of them, many have or claim in and to the aforedescribed securities, and file the same with the undersigned Referee at his office, 501 Securities Building, in the city of Omaha, Nebraska, on or before April 16, 1930, at 9:00 A. M., and notice having been given to each of said persons in accordance with the provisions of the said order of said referee, and in pursuance of the provisions of the Bankruptcy Act, and answers and applications having been filed with said referee by Anna McGlade, R. C. Peters, M. J. Laure, Florence I. Moore and Ellen M. Nash, and the said matter having by order of said referee been set down for hearing on April 23, 1930, at 10:00 A. M., and having on said date at the request of H. M. Baldridge, attorney for the Guaranty Trust Company, been continued to April 25, 1930, at 9:00 A. M., at which time the said matter came on for hearing, the Guaranty Trust Company appearing by H. M. Baldridge, its attorney, the Peters Trust Company, bankrupt, appearing by H. S. Daniel, trustee, and his attorneys, W. B. Lane and Arthur F. Mullen, and Anna McGlade appearing by A. E. Royce, her attorney, and R. C. Peters, M. J. Laure, Florence I. Moore and Ellen M. Nash, appearing by their respective attorneys, Herman Aye and J. P. Moore, and thereupon H. S. Daniel, trustee, by his attorneys, having asked leave of court to amend the answer of H. S. Daniel, trustee, by adding thereto paragraph IX, reading as follows, to-wit:

"The trustee further alleges that with full knowledge of all the facts alleged in the applicant's petition, the applicant ratified and confirmed the sale of the said securities by attempting to impress a lien on the funds belonging to the bankrupt estate on deposit with the applicant, and

is estopped to now reclaim said securities from the undersigned trustee."

which leave was thereupon granted by the court and thereupon the Guaranty Trust Company by its attorney having moved the court to strike from the answer of said Herbert S. Daniel, trustee, paragraphs VII and VIII of said answer, and the said motion to strike having been argued by counsel for the respective parties, and thereupon the court having overruled the said motion to strike, and there- [fol. 20] upon the said Guaranty Trust Company, by its attorney, H. M. Baldridge, having filed its written dismissal of its application for reclamation, this 25th day of April, 1930, and the court having heard argument of counsel thereon, and thereupon the court having dismissed the said application of the Guaranty Trust Company only insofar as said petition or application seeks the reclamation of the securities therein described, and it appearing that Herbert S. Daniel, trustee, in his answer is seeking affirmative relief from the said Guaranty Trust Company of New York, and the issues raised by the pleadings on file should be heard forthwith, and thereupon the matter having come on for hearing upon the pleadings, and the court having heard the evidence and being fully advised in the premises, finds that the respective persons named in paragraph VII of the answer of Herbert S. Daniel, trustee, are entitled to the securities set opposite their respective names, upon the payment of the balance, if anything, due the bankrupt estate from said respective persons, and the court further finds that said trustee has the said securities in his possession and should deliver them to the respective persons named in said paragraph VII of his answer, upon the payment of such sums as may be due from said respective persons to said bankrupt estate, and further finds that the balance of the securities named in the application of the Guaranty Trust Company and of the answer of Herbert S. Daniel, trustee, are the property of the bankrupt estate herein.

And the court further finds that the Guaranty Trust Company has in its hands the sum of $23,724.60 in cash, belonging to Herbert S. Daniel, trustee of the above named bankrupt; that said sum was accumulated by Herbert S. Daniel as receiver subsequent to February 12th, 1930, said

moneys having been collected by said Guaranty Trust Company for and on behalf of said bankrupt estate from the Prudential Insurance Company of America on mortgages made by the bankrupt and sold to the Prudential Insurance Company of America, and that said Guaranty Trust Company has not made herein any claim to the said fund of $23,724.60, and has no claim to the said fund, or to any part thereof, and is merely holding the said sum of $23,724.60 as custodian and agent of Herbert S. Daniel, as trustee of the above named bankrupt, and that said sum should be delivered forthwith to said trustee.

And the court further finds generally that the allegations in the answer of Herbert S. Daniel, trustee, are true. [fol. 21] It Is Therefore Ordered That Herbert S. Daniel, as trustee, be, and he is hereby ordered to deliver to the respective persons named in paragraph VII of said answer, the securities appearing opposite the names of said respective persons, upon the payment by said respective persons to said trustee of any sums which may be due from said respective persons to said bankrupt estate.

And It Is Further Ordered That the Guaranty Trust Company of New York, the applicant herein, be, and it is hereby ordered and directed to forthwith pay over to Herbert S. Daniel, as trustee of the above bankrupt estate, the sum of $23,724.60, of moneys in the hands of said Guaranty Trust Company of New York, belonging to Herbert S. Daniel, trustee of said bankrupt estate, with interest thereon at the rate of 7 per cent per annum from this date.

Witness My Hand This 25th day of April, 1930.

B. H. Dunham, Referee.

Filed Apr. 25, 1930. B. H. Dunham, Referee.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 4260. In Bankruptcy

In the Matter of PETERS TRUST COMPANY, Bankrupt

PETITION OF GUARANTY TRUST COMPANY OF NEW YORK FOR REVIEW OF REFEREE'S ORDER—Filed May 15, 1930

Petitioner, the Guaranty Trust Company of New York, was the claimant of certain bonds in the custody and pos-

session of the trustee in bankruptcy of the above named bankrupt, and, as such, on April 2, 1930, filed with Hon. B. H. Dunham, Referee in Bankruptcy, its petition for the reclamation thereof, to which answer was filed by the said trustee on April 3, 1930, copies whereof are included in the certified transcript of the record of the proceedings before the said referee in said matter hereto attached. On April 25, 1930, a hearing was had and held in said matter before said referee, at the conclusion of which certain findings and orders were made by said referee, the proceedings at said hearing and the said findings and orders being set forth in said certified transcript hereto attached.

[fol. 22] Upon said hearing the petitioner, by its attorney, moved the court to strike from the answer of said trustee, paragraph VIII, of said answer, on the ground that the said referee had no jurisdiction to hear and determine the matters therein alleged, which said motion was by the court overruled, and thereupon the petitioner filed with said referee its written dismissal of its said petition for reclamation, a copy whereof is included in said certified transcript. Notwithstanding the said dismissal, the said referee failed and refused to discontinue and terminate the said hearing, but proceeded to hear and take evidence upon the allegations of paragraph VIII of said answer, wherein the said trustee set forth that the petitioner, the Guaranty Trust Company of New York, had in its possession, on deposit, the sum of $31,224.60, belonging to said bankrupt estate, and should be required to account therefor in said reclamation proceedings.

After filing its said dismissal, the petitioner withdrew from said hearing and participated no further therein.

Upon the said hearing and at the conclusion thereof, the said referee made a final order that the petitioner forthwith pay over to the said trustee the sum of $23,724.60, moneys in its hands, with interest at 7 per cent per annum from the date of said order.

Said order is erroneous in this, that the said petition for reclamation was for the recovery of certain specific personal property, to-wit: the bonds described therein, and no allegations were made or issue raised in said petition relative to any other transactions between the petitioner and the above named bankrupt, or as to any money on deposit with the

petitioner; that the allegations of paragraph VIII of the trustee's said answer attempted to raise an issue with regard to money in the possession of the petitioner, not in the possession of said trustee or in the custody of jurisdiction of the said bankruptcy court, and beyond the scope of the petitioner's said reclamation petition; that, upon the petitioner's said voluntary dismissal of its said reclamation petition, the said referee was without power or jurisdiction to proceed farther with said hearing, or to hear and adjudicate the right of the petitioner with respect to the said money alleged to be in its possession; that by its said motion to strike said paragraph VIII from the said trustee's answer and its subsequent voluntary dismissal, the petitioner manifested its refusal to consent to a hearing or adjudication upon its rights with respect to said money in its possession; no such consent on its part was shown or proved at said hearing, and the said referee was, therefore, without jurisdiction to hear or determine the same; [fol. 23] that the said order of said referee overruling the petitioner's said motion to strike said paragraph VIII of the said trustee's answer was erroneous, and all further proceedings and orders of said referee with respect to the subject matter of said paragraph were without jurisdiction and void.

Wherefore petitioner prays for a review of said proceedings and the order of said referee, and that said order be reversed and set aside.

Guaranty Trust Company of New York, Petitioner for Review, by Baldrige, Dorsey & Baldrige, Attorneys for Petitioner.

Endorsed: Filed May 12, 1930. B. H. Dunham, Referee.

[File endorsement omitted.]

In United States District Court

In Bankruptcy. Case No. 4260

In the Matter of Peters Trust Company, Bankrupt

Voluntary Petition

Referee's Certificate on Review—Filed May 15, 1930

At 501 Securities Building, in the City of Omaha, Douglas County, Nebraska, in said District, Before B. H. Dunham, Referee in Bankruptcy, May 15th, 1930

To the Honorable Joseph W. Woodrough, United States District Judge:

I, B. H. Dunham, Referee in Bankruptcy in charge of this proceeding, do hereby certify that in the course of such proceeding, an order which is hereto attached, was made and entered on the 25th day of April, 1930, ordering the Guaranty Trust Company of New York to forthwith pay over to Herbert S. Daniel, as trustee of the above bankrupt estate, the sum of $23,724.60 of moneys in the hands of said Guaranty Trust Company of New York, belonging to Herbert S. Daniel, trustee of said bankrupt estate, with interest thereon at the rate of 7 per cent per annum from the date of said order. That on May 12, 1930, said Guaranty Trust Company of New York, as petitioner, feeling aggrieved at [fol. 24] said order, filed a petition for a review, which was granted. That the evidence on which said order was based, is hereto attached.

That the sole question upon this review is whether the undersigned Referee had jurisdiction under the facts appearing in the record to enter the said order of April 25, 1930, requiring the Guaranty Trust Company of New York to forthwith pay over to Herbert S. Daniel, as trustee of said bankrupt estate, the said sum of $23,724.60, of moneys in the hands of said Guaranty Trust Company of New York, with interest thereon at 7 per cent per annum from the date of said order.

The petitioner, Guaranty Trust Company of New York in its petition for said review claims that the said order was erroneous for the following reasons:

a. That the petition of said Guaranty Trust Company for reclamation was for the recovery of certain specific personal property, to-wit, the bonds described therein, and no allegations were made or issue raised in the said petition relative to any other transactions between said petitioner and said bankrupt, or as to any money or deposit with the petitioner.

b. That the allegations of paragraph VIII of the trustee's answer to said petition attempted to raise an issue with regard to money in the possession of the petitioner, not in the possession of said trustee, or in the custody or

jurisdiction of said bankruptcy court, and that the said issue was beyond the scope of the petitioner's reclamation petition.

c. That upon the petitioner's voluntary dismissal of its said reclamation petition, said Referee was without power or jurisdiction to proceed further with said hearing, or to hear and adjudicate the rights of the petitioner with respect to the said money alleged to be in its possession.

d. That by the petitioner's motion to strike paragraph VIII of the trustee's answer, and its subsequent voluntary dismissal, the petitioner manifested its refusal to consent to a hearing or adjudication upon its rights with respect to said money in its possession; and no such consent on its part was shown or proved at said hearing, and said Referee was therefore without jurisdiction to hear or determine the same.

e. That the said order of said Referee overruling the petitioner's motion to strike said paragraph VIII of said trustee's answer, was erroneous, and all further proceedings and orders of said Referee with respect to the subject matter of said paragraph were without jurisdiction and void.

[fol. 25] I hand up herewith for the information of the Judge, the following papers:

1. The application or petition of the Guaranty Trust Company of New York, for reclamation, filed herein April 2, 1930.

2. The answer of Herbert S. Daniel, trustee, filed herein April 3, 1930, with the amendment thereto of Paragraph IX, made April 25, 1930.

3. The order entered by the undersigned Referee on April 5, 1930, upon the said application or petition of the Guaranty Trust Company for reclamation, and the answer of Herbert S. Daniel, as trustee, impleading certain parties therein named in the said controversy, and ordering the said application or petition for reclamation, and the said answer of Herbert S. Daniel as trustee, and such of the claims, if any, in writing, as may be made by the parties impleaded, to be set for hearing before said Referee on April 23, 1930, at ten o'clock A. M.

4. The written dismissal of said Guaranty Trust Company of New York of its application or petition for reclamation, which said dismissal was filed April 25, 1930.

5. Transcript of proceedings before said Referee upon the said application or petition for reclamation by the Guaranty Trust Company of New York, the answer of the trustee thereto, and claims of intervenors, Anna McGlade, et al.

6. The Findings of Fact and Order entered by the undersigned Referee on April 25, 1930, wherein said Referee ordered the said Guaranty Trust Company of New York, to forthwith pay over to Herbert S. Daniel as trustee of said bankrupt estate, the sum of $23,724.60, being the order under review upon this review.

7. The petition of the Guaranty Trust Company of New York, for a review of the said order of the Referee of April 25, 1930, which petition for review was filed herein May 12, 1930.

The foregoing is the complete record of all the proceedings had before me upon the application or petition of said Guaranty Trust Company of New York for reclamation, and the answer of Herbert S. Daniel, trustee of said bankrupt estate, thereto, I do not incorporate in the record herein the written answers of the intervenors in said proceeding who intervened pursuant to my order of April 5, 1930, for the reason that said answers would only encumber the record herein, the sole question being only as to the power or jurisdiction of the Referee to enter the order of [fol. 26] April 25, 1930, wherein he ordered and directed said Guaranty Trust Company of New York, to forthwith pay to Herbert S. Daniel, as trustee of said bankrupt estate, the aforementioned sum of $23,724.60, with interest thereon at 7 per cent per annum from the date of said order.

Dated this 15th day of May, 1930.

Respectfully submitted.

B. H. Dunham, Referee in Bankruptcy.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

In Bankruptcy. No. 4260

In the Matter of PETERS TRUST COMPANY, Bankrupt

Voluntary Petition

ORDER AMENDING ORDER OF REFEREE AND AS AMENDED AFFIRMED—Filed Nov. 21, 1930

This cause came on to be heard on the petition for review of the Guaranty Trust Company of New York to review the order entered by B. H. Dunham, Referee in Bankruptcy, on April 25, 1930, was argued by counsel and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

That the order of B. H. Dunham, Referee in Bankruptcy, dated April 25, 1930, ordering and directing the Guaranty Trust Company of New York to forthwith pay over to Herbert S. Daniel, as Trustee of Peters Trust Company, bankrupt, the sum of $23,724.60, with interest thereon at the rate of 7% per annum from date of said order, *he* modified and amended by the elimination of the direction to pay interest by striking from the said order the words, "with interest thereon at 7% per annum from date" and as thus amended the said order be and hereby is affirmed.

The petitioner, Guaranty Trust Company of New York, duly excepted to this order and an exception is hereby allowed.

It Is Further Ordered that Exhibits A and B referred to in the transcript certified by the Referee (but which the [fol. 27] Referee failed to incorporate in said transcript) should be attached to the said transcript and made a part thereof, the said exhibits being the statements of the account of the Peters Trust Company with the Guaranty Trust Company of New York, furnished by the said Guaranty Trust Company of New York, and the Clerk of this Court is directed to attach the said exhibits to the said transcript and they shall become a part of the said transcript in said proceedings.

By the Court:

J. W. Woodrough, Judge.

[File endorsement omitted.]

In United States Circuit Court of Appeals for the Eighth Circuit

Guaranty Trust Company of New York, a Corporation, Appellant,

vs.

Herbert S. Daniel, Trustee of Peters Trust Company, Bankrupt

Præcipe for Transcript—Filed Dec. 20, 1930

To the Clerk of the District Court of the United States for the District of Nebraska, Omaha Division:

Please prepare transcript for appeal to United States Circuit Court of Appeals for the Eighth Circuit in the above entitled cause and include therein the following:

1. The petition for reclamation filed by Guaranty Trust Company in the matter of Peters Trust Company, bankrupt, in said district court.

2. The answer of the trustee in bankruptcy thereto.

3. The transcript of proceedings had before the referee upon said petition and answer on April 25, 1930, including the motions and remarks of counsel and the testimony taken, as certified by the referee to said district court on petition for review filed by the said [by the said] Guaranty Trust Company.

4. The order of the referee at the conclusion of said proceedings of April 25, 1930.

5. The petition for review on said referee's order filed by said Guaranty Trust Company.

[fol. 28] 6. The questions presented and summary of the evidence certified by said referee to said district court upon said petition for review.

7. The order of said district court entered November 21, 1930, on the hearing of said petition for review.

8. This præcipe and acknowledgment of service thereon.

Guaranty Trust Company of New York, a Corporation, Appellant, by W. C. Dorsey, H. M. Baldrige, Attorneys for Appellant.

Service of copy of this præcipe is hereby acknowledged this 20 day of December, 1930.

Paul L. Martin, Winthrop B. Lane, Attorneys for Herbert S. Daniel, Trustee of Peters Trust Co., Bankrupt.

[File endorsement omitted.]

Clerk's certificate to transcript omitted in printing.

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

In the Matter of PETERS TRUST COMPANY, Bankrupt

In re Proceedings upon Petition for Reclamation of Guaranty Trust Company of New York

PETITION FOR ALLOWANCE OF APPEAL—Filed Dec. 15, 1930

To the Honorable the Circuit Court of Appeals for the Eighth Circuit:

The petitioner, Guaranty Trust Company of New York, a corporation, respectfully shows unto the court that some time prior to April 25, 1930, it filed in the District Court of the United States for the District of Nebraska, Omaha Division, in the matter of Peters Trust Company, a bankrupt, its petition for reclamation of certain bonds in the possession of the trustee of the estate of said bankrupt, to which the said trustee filed answer, and on April 25, 1930, a hearing was had before the referee in bankruptcy upon said petition and answer, at the conclusion whereof an order was entered by said referee in bankruptcy directing the said Guaranty Trust Company forthwith to pay over to said trustee the sum of $23,724.60.

Thereafter the said Guaranty Trust Company filed its petition in said court for review of the said order, and on November 21, 1930, it was ordered by said court that the said referee's order to pay over said sum to the trustee be affirmed.

The petitioner brings this its petition to be allowed to appeal from said order to this court upon the grounds set forth in the assignment of errors filed herewith.

The petitioner, feeling itself aggrieved by the said order so entered by the United States District Court for the District of Nebraska, hereby appeals from said order and prays that its appeal to this court may be allowed, that a [fol. 30] citation be issued to said trustee as provided by law, and that a duly authenticated transcript of the record, proceedings and papers upon which said order was made and entered be sent to this court.

Guaranty Trust Company of New York, a Corporation, by W. C. Dorsey, H. M. Baldrige, Its Attorneys.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Dec. 15, 1930

Guaranty Trust Company of New York, a corporation, complains that the order of the District Court of the United States for the District of Nebraska made and entered on November 21, 1930, in the above entitled proceedings affirming the order of the referee in bankruptcy entered thereon on April 25, 1930, directing the said Guaranty Trust Company of New York forthwith to pay over to the trustee of the above named bankrupt the sum of $23,724.60, is erroneous for the reasons stated in the following assignment of errors, upon which the said Guaranty Trust Company will rely for the reversal of said order and of the order of the said referee affirmed thereby to-wit:

I

The proceedings in which said referee's order was made were upon a petition for reclamation filed by the said Guaranty Trust Company to recover the possession of certain bonds specifically described therein then in the possession

of the trustee in bankruptcy, and no other issue was raised or relief prayed for. The answer filed by the trustee to said petition, in paragraph VIII thereof, set forth that the said Guaranty Trust Company of New York had in its possession, on deposit, $31,224.60 belonging to the bankrupt estate that it had refused to deliver to the trustee although [fol. 31] demand therefor had been made, and that it should be required to account therefor in said reclamation proceedings. The prayer of said answer was, among other things, that an order be entered directing the said Guaranty Trust Company forthwith to pay over said sum to the said trustee. At the hearing before the referee upon said petition for reclamation, the said Guaranty Trust Company, by its attorney, moved in open court that paragraph VIII of said answer be stricken out, which said motion was overruled. The referee erred in overruling said motion for the reason that the matters and things alleged in said paragraph were not germane to the issue presented by said petition for reclamation and the said referee was without jurisdiction to hear and determine the same.

II

After the motion referred to in the preceding assignment of error had been overruled as aforesaid, the said Guaranty Trust Company, by its attorney, in open court at said hearing filed its written dismissal of its said petition for reclamation and withdrew from further participation in said proceedings. Notwithstanding said dismissal and withdrawal, the said referee proceeded with said hearing upon the matters and things alleged and set forth in paragraph VIII of the trustee's said answer and at the conclusion thereof made and entered the order complained of herein, directing the said Guaranty Trust Company to pay over the sum of $23,724.60 to the said trustee. The said referee was without jurisdiction to proceed with any further hearing based upon said petition for reclamation after the same had been dismissed as aforesaid.

III

Under the facts and circumstances set forth in the two preceding assignments of error, the referee was without jurisdiction to hear or determine the trustee's said claim

to the said sum alleged in paragraph VIII of his said answer to be in the possession of the said Guaranty Trust Company, and his said order relative thereto was erroneous and void, for the reason that said Guaranty Trust Company was, on the face of the record, in possession of said money outside of and beyond the territorial jurisdiction of said bankruptcy court, and was and is an adverse claimant thereof entitled to its day in court in a plenary action in some court having jurisdiction of its person and of the said funds in its possession.

[fol. 32]

IV

Under the facts and circumstances set forth in the preceding assignments of error, the said referee was without jurisdiction to hear and determine the trustee's claim to said money in possession of the said Guaranty Trust Company, and his said order complained of was erroneous and void, for the reason that the said petition *for the reason that the said petition* for reclamation was confined to the specific personal property the possession whereof was claimed therein, and the filing of said petition did not confer jurisdiction upon the said bankruptcy court, in summary proceedings before said referee, to convert the same into an action of accounting for money not in the said trustee's possession or within the territorial jurisdiction of said bankruptcy court.

V

Under the facts and circumstances set forth in the preceding assignments of error, the referee's said order complained of was without jurisdiction, null and void, for the reason that the said Guaranty Trust Company was not amenable to the summary jurisdiction of said bankruptcy court at said hearing so far as the same related to the money in its possession claimed by said trustee, and no consent was ever given by it that said issue should be litigated therein.

VI

The court erred in its order affirming the order of the said referee directing the said Guaranty Trust Company

to pay over said sum of $23,724.60 to the said trustee, for the reason that the referee's said order was without jurisdiction, as more fully set forth in the preceding assignments of error.

Wherefore the said Guaranty Trust Company of New York prays that the order of this court affirming the referee's said order be reversed, with directions to reverse, vacate and set aside the order of said referee entered April 25, 1930.

Guaranty Trust Company of New York, a Corporation, by W. C. Dorsey, H. M. Baldrige, Its Attorneys.

[File endorsement omitted.]

[fols. 33-35] Bond on appeal for $500.00, approved and filed December 18, 1930, omitted in printing.

[fol. 36] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

ORDER ALLOWING APPEAL—Dec. 15, 1930

[fol. 37] Now on this 15th day of December, 1930, upon reading the petition of Guaranty Trust Company of New York, a corporation, for the allowance of an appeal to this court, and on consideration of the asignment of errors presented therewith,

It is ordered that an appeal of this cause by the said Guaranty Trust Company of New York to the Circuit Court of Appeals for the Eighth Circuit be, and the same is hereby allowed from the order of the District Court of the United States for the District of Nebraska, Omaha Division, made and entered on November 21, 1930, in the above entitled cause, docketed in said court as Case No. 4260 in Bankruptcy, affirming the order of the Referee in Bankruptcy made and entered on April 25, 1930, therein,

directing the said Guaranty Trust Company of New York to pay over the sum of $23,724.60 to the trustee of said bankrupt estate; that the said Guaranty Trust Company give bond in the sum of $500.00, with sufficient surety, conditioned to prosecute its said appeal to effect, and to answer all costs if it shall fail to make its plea good, said bond to be approved by one of the Judges of this Court, and that a citation to said trustee be issued out of and under the seal of this court according to law.

The allowance of this appeal shall not operate as a stay of the order of the District Court directing the Guaranty Trust Company of New York to pay to the Trustee in Bankruptcy the sum of $23,724.60 and the Trustee may proceed to enforce said decree the same as though this appeal had not been granted.

December 15, 1930.

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

ORDER FOR HEARING OF CASE AT MARCH TERM, 1931—Dec. 15, 1930

[fols. 38 & 39] On the application of counsel for the appellee to advance this cause for hearing at an early date, counsel for the appellant consenting thereto in open Court, It is now here ordered by this Court that this cause be assigned for hearing at the March Term, 1931, of this Court. The briefs of counsel are to be filed in accordance with the provisions of the rules of this Court.

December 15, 1930.

Citation, in usual form, showing service on Winthrop B. Lane, filed December 15, 1930, omitted in printing.

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

STIPULATION TO INCLUDE COPIES OF EXHIBIT B IN COPIES OF PRINTED RECORD—Filed Feb. 14, 1931

It is hereby stipulated by and between the appellant and appellee that, through oversight of the Clerk of the District Court, Exhibit B was omitted from the transcript of the record prepared in the above matter. Under the præcipe for said transcript, Exhibit B should have been included in the said transcript and the omission of the said exhibit has just been discovered by the parties hereto.

It is, therefore, stipulated that the attached photostatic copy of Exhibit B is a true, accurate, and complete copy of the said exhibit and the said Exhibit B shall be included in the printed transcript of the record prepared by the Clerk of this Court and the costs thereof shall be taxed to the appellant.

Baldrige, Dorsey & Baldrige, Attorneys for Appellant. Winthrop B. Lane, Attorney for Appellee.

(Here follows Exhibit "B," side folios 41 and 42)

EXHIBIT "B"

Guaranty Trust Company of New York

140 BROADWAY
NEW YORK

STATEMENT FOR MONTH ENDING NOV 25 1929

PETERS TRUST COMPANY
OMAHA NEBRASKA

KEY
LAT—LIST
CC—CREDIT MEMO
CS—CERTIFIED CHECK
CT—CUSTOMER'S CHECK RETURNED
IN—INTEREST

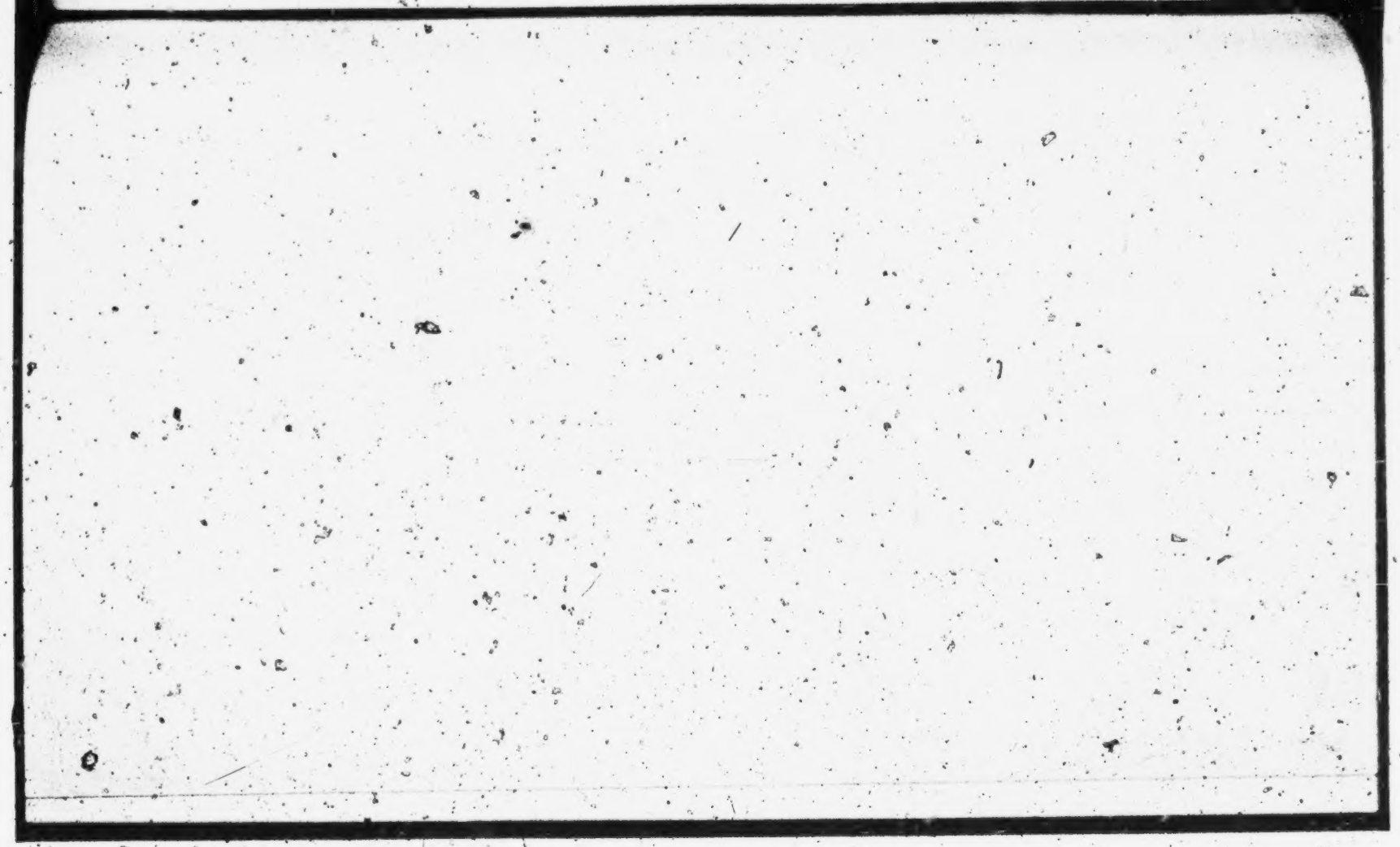
DATE	DEBITS	DATE	CREDITS		DATE	BALANCE
			BALANCE BROUGHT FORWARD		NOV 21	37,788.98
NOV 21 DM	2,616.25	DM	96.85			
NOV 21 DM	780.33	DM	3,861.35		NOV 21	49,562.42
NOV 22	1,560.26		200.00			
NOV 22	300.00		10,000.00		NOV 22	37,302.16
		NOV 22	4,903.70			
		NOV 22	2,446.00		NOV 22	44,851.86
NOV 22 DM	1.24	DM	20,000.00			
NOV 22 DM	951.19	DM	956.25		NOV 22	28,054.85
		NOV 22	5,111.67			
NOV 23	365.63		78.00		NOV 23	24,370.59
NOV 23	3,240.63					
					NOV 23	4,370.59
NOV 23 DM	20,000.00					
		NOV 25	78.33			
		NOV 25	25,861.36			
		NOV 25	2,354.82		NOV 25	33,547.12
NOV 25 DM	.99	DM	.25,000.00			
NOV 25 DM	31,046.35				NOV 25	.00

THIS ACCOUNT IS SUBJECT TO WHATEVER LIENS OR OFFSETS THAT MIGHT BE CHARGED AGAINST IT BY THE GUARANTY TRUST COMPANY OF NEW YORK

LAST BALANCE IN THIS COLUMN IS THE FINAL BALANCE OF THIS SHEET

PLEASE EXAMINE STATEMENT AND VOUCHERS IF NO REPLY BE MADE WITHIN TEN DAYS THE ACCOUNT WILL BE CONSIDERED CORRECT.

36A



[fol. 43] Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 44] Appearances of counsel omitted in printing.

[fol. 45] Minute entry of argument and submission, March 19, 1931, omitted in printing.

[fol. 46] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, MAY TERM, A. D. 1931

No. 9088

GUARANTY TRUST COMPANY OF NEW YORK, Appellant,

vs.

HERBERT S. DANIEL, Trustee of Peters Trust Company, Bankrupt, Appellee

Appeal from the District Court of the United States for the District of Nebraska

Mr. William C. Dorsey (Mr. H. Malcolm Baldrige was with him on the brief) for appellant.

Mr. Winthrop B. Lane (Mr. Halleck F. Rose, Mr. Arthur R. Wells and Mr. Paul L. Martin were with him on the brief) for appellee.

Before Van Valkenburgh and Booth, Circuit Judges, and Munger, District Judge

OPINION—Filed May 4, 1931

MUNGER, District Judge, delivered the opinion of the court.

The Peters Trust Company of Omaha, Nebraska, a banking corporation, hereafter called bankrupt, was adjudged insolvent in a proceeding in the state court on November

25, 1929. On November 27, 1929, a petition was filed in the United States Court at Omaha by some of its creditors asking that it be declared a bankrupt and on December 10, [fol. 47] 1929, an adjudication of bankruptcy and order of reference were made on this petition and Herbert S. Daniel was appointed as receiver. The receiver was afterwards chosen as trustee of the bankrupt. In April, 1930, appellant, the Guaranty Trust Company of New York, filed before the referee at Omaha, Nebraska, a petition for reclamation of certain negotiable bonds. In its petition the Guaranty Trust Company alleged that the Guaranty Company of New York had shipped these bonds to the bankrupt on November 20, 21 and 23, 1929, pursuant to an order of the bankrupt and that they were received by the bankrupt on November 23 and November 25, 1929. It alleged that the bankrupt knew of its insolvency when it ordered the bonds, and did not intend to pay for them, that they were fraudulently obtained and that no valid title to them passed to the bankrupt. It was further alleged that the Guaranty Company had assigned to the Guaranty Trust Company the accounts against the bankrupt for the bonds, that the Guaranty Trust Company was the owner of the bonds, and the prayer was for an order by the referee directing the trustee to deliver the bonds to the petitioner, and for such other relief as might be just and proper. The Trustee answered this petition for reclamation, asserting that the sale of the bonds to the bankrupt had been made in the usual course of business, and denied a fraudulent purchase. In addition to these defensive averments, the trustee alleged that the Guaranty Trust Company had in its possession $31,224.60 which belonged to the bankrupt estate, which had been accumulated by the receiver and trustee of the bankrupt after the adjudication, and asked for an order directing the Guaranty Trust Company to pay this amount to the trustee. At a hearing before the referee the Guaranty Trust Company moved that this portion of the answer by the trustee should be stricken out, because it pertained to an issue separate from the one presented by the petition for reclamation, and was an issue not within the jurisdiction of the referee. The referee overruled this motion and thereafter the Guaranty Trust Company announced that it was entering a dismissal of its reclamation proceedings and participated no further in the hearing before the referee. The hearing continued before

the referee and testimony was received from a number of witnesses, and at the conclusion the referee entered an order, which, in part, was as follows:

[fol. 48] "And the court further finds that the Guaranty Trust Company has in its hands the sum of $23,724.60 in cash, belonging to Herbert S. Daniel, trustee of the above named bankrupt; that said sum was accumulated by Herbert S. Daniel, as receiver subsequent to February 12th, 1930, said moneys having been collected by said Guaranty Trust Company for and on behalf of said bankrupt estate from the Prudential Insurance Company of America on mortgages made by the bankrupt and sold to the Prudential Insurance Company of America, and that said Guaranty Trust Company has not made herein any claim to the said fund of $23,724.60, and has no claim to the said fund, or to any part thereof, and is merely holding the said sum of $23,724.60 as custodian and agent of Herbert S. Daniel, as trustee of the above named bankrupt, and that said sum should be delivered forthwith to said trustee.

"And the court further finds generally that the allegations in the answer of Herbert S. Daniel, trustee, are true. * * *

"And it is further ordered that the Guaranty Trust Company of New York, the applicant herein, be, and it is hereby ordered and directed to forthwith pay over to Herbert S. Daniel, as trustee of the above bankrupt estate, the sum of $23,724.60, of moneys in the hands of said Guaranty Trust Company of New York, belonging to Herbert S. Daniel, trustee of said bankrupt estate, with interest thereon at the rate of 7 per cent per annum from this date."

The Guaranty Trust Company filed with the referee a petition for review of this order, and this petition for review was submitted to the court upon the record and the proceedings before the referee. The court affirmed the order, except as to the allowance of interest. The Guaranty Trust Company has appealed from this decision. Its assignments of error allege, in various forms of expression, that the referee was without jurisdiction to make the order complained of, after appellant had dismissed its petition for reclamation. It also alleged that appellant was in possession of the moneys in controversy, and that

it was outside of the territorial jurisdiction of the bankruptcy court. A further claim was made that appellant was an adverse claimant of the money. No complaint was made of the facts found by the referee. Under these find-
[fol. 49] ings, there is no basis for any claim that the appellant was an adverse claimant, both because no such claim was asserted, and because the referee found that the money in question was the bankrupt's and had been received after the bankruptcy proceedings had begun.

There remains the question whether the referee and the court below had the power to order this money to be turned over to the referee. Appellant does not question the authority of a bankruptcy court, through ancillary proceedings in the territorial jurisdiction of appellant's residence, to order the delivery of the bankrupt's assets, but appellant asserts that it was not subject to the order of the referee in this case, although it had filed a petition in reclamation before him. The courts of bankruptcy may act in the exercise of their jurisdiction in their territorial limits, but there may be ancillary bankruptcy proceedings in other districts, in aid of the bankruptcy court exercising primary jurisdiction. Bank. Act, Sec. 2 (20); Babbitt v. Dutcher, 216 U. S. 102; Elkus, Petitioner, 216 U. S. 115; Lazarus v. Prentice, 234 U. S. 263. An order by the referee directing appellant, as a resident of New York, to surrender to the trustee property which it held there, would be beyond the ordinary powers of the referee. Staunton v. Wooden, 179 Fed. 61.

Appellee claims that the referee had jurisdiction to make the order complained of, because a bankruptcy case is a proceeding in equity, and when the appellant filed its petition for reclamation it became subject to Equity Rule No. 30, which provides that the answer, in an equity case, "must state in short and simple form any counter claim arising out of the transaction, and may, without cross bill, set out any set off or counter claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set off or counter claim so set up shall have the same effect as a cross suit, so as to enable the court to pronounce final judgment in the same suit on both the original and cross claims."

It may be conceded that the trustee might have brought an independent suit in equity to recover the amount of money which he alleged the appellant had, belonging to the bankrupt estate. Whitney v. Wenman, 198 U. S. 539. What was the power of the referee to hear and determine such an issue, if the allegations of the answer should be treated under Equity Rule No. 30, as the statement of [fol. 50] a counter claim? In Weidhorn v. Levy, 253 U. S. 268, the court considered the authority of a referee to entertain a suit against a third person seeking to set aside an alleged fraudulent conveyance and to recover for the estate the goods conveyed. After referring to the provisions in the Bankruptcy Act and in the General Orders in Bankruptcy, conferring power upon the referee, the court decided that such a suit was not a "proceeding" in bankruptcy, within the meaning of that term as found in General Order Number XII (1). The court said:

"We find nothing in the provisions of the Bankruptcy Act that makes it necessary or reasonable to extend the authority and jurisdiction of the referee beyond the ordinary administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof, or to extend the authority of the referee under the general reference so as to include jurisdiction over an independent and plenary suit such as the one under consideration. The provisions of the act, as well as the title of his office, indicate that the referee is to exercise powers not equal to or coordinate with those of the court or judge, but subordinate thereto; and he becomes 'the court' only by virtue of the order of reference. In the General Orders the word 'proceedings' occurs frequently, but never in a sense to include a plenary suit. On the other hand, 'proceedings in equity' and 'proceedings at law' are specially dealt with in General Order XXXVII."

See also Remington on Bankruptcy, Secs. 648, 2188, 2194.

We think the reasoning in this case applies also to any plenary suit brought before the referee by the trustee to recover a sum of money alleged to belong to the bankrupt, but the petition of appellant for reclamation and the portion of the trustee's answer which asked for affirmative re-

lief were, in fact, petitions by the parties asking the referee to exercise his summary jurisdiction in proceedings in bankruptcy. The two proceedings were quite distinct. Appellant sought to recover certain bonds to which it claimed title. The trustee sought an order that appellant should pay over money of the bankrupt estate received by appellant, after bankruptcy. The proceedings would not have been more unrelated to each other, if the trustee had sought an order on appellant for the delivery of books and papers such as was asked in Babbitt v. Dutcher, 216 U. S. 102, or [fol. 51] an order for the examination of witnesses such as was asked in Elkus, Petitioner, 216 U. S. 115. We have been cited to no authority for the proposition that a creditor or other petitioner asking specific relief against a bankrupt's estate, as provided by the Bankruptcy Act, thereby becomes subject to summary orders by the referee in matters entirely disconnected from the subject matter of such claim or petition, and no such authority is believed to exist. Under the circumstances we think that the appellant's objections to the jurisdiction should have been sustained and the order of the court affirming the order of the referee will be reversed.

[fol. 52] In United States Circuit Court of Appeals, Eighth Circuit

No. 9088

Guaranty Trust Company of New York, a Corporation, Appellant,

vs.

Herbert S. Daniel, Trustee of Peters Trust Company, Bankrupt

Appeal from the District Court of the United States for the District of Nebraska

Decree—May 4, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed with costs; and that the Guaranty Trust Company of New York, a Corporation, have and recover against Herbert S. Daniel, Trustee of Peters Trust Company, Bankrupt, the sum of — Dollars for its costs in this behalf expended, to be paid by said Trustee out of any funds in his hands belonging to the said bankrupt estate.

And it is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for proceedings not inconsistent with the opinion of this Court.

[fol. 53] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 54] SUPREME COURT OF THE UNITED STATES.

ORDER ALLOWING CERTIORARI—Filed October 19, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,993. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 179. Herbert S. Daniel, trustee of Peters Trust Company, bankrupt, petitioner, vs. Guaranty Trust Company of New York. Petition for a writ of certiorari and exhibit thereto. Filed June 23, 1931. File No. 35,993.

FILE COPY

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JUN 2
CHARLES ELMO

In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 179

HERBERT S. DANIEL, TRUSTEE OF PETERS TRUST COMPANY, BANKRUPT,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HALLECK F. ROSE,
ARTHUR R. WELLS,
PAUL L. MARTIN AND
WINTHROP B. LANE,
Counsel for Petitioner.

COCKLE PRINTING CO., LAW BRIEFS, OMAHA

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In the
Supreme Court of the United States

OCTOBER TERM, 1931.

No._____

HERBERT S. DANIEL, TRUSTEE OF PETERS TRUST COMPANY, BANKRUPT,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Supreme Court of the United States:

The above named petitioner, Herbert S. Daniel, trustee of Peters Trust Company, bankrupt, prays for a writ of certiorari to review the order and decree of the United States Circuit Court of Appeals for the Eighth Circuit, entered May 4, 1931, in a cause heard and determined in

said court on appeal from the District Court of the United States for the District of Nebraska, entitled "Guaranty Trust Company of New York, appellant, vs. Herbert S. Daniel, Trustee of Peters Trust Company, bankrupt, appellee," a certified copy of the record and proceedings whereof are filed and presented herewith.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

December 10, 1929, an adjudication of bankruptcy was entered against Peters Trust Company, incorporated under a statute of Nebraska governing trust companies, that forbade the conduct by it of the business of banking. *Petitioner was, on the date of the adjudication appointed receiver. On March 17, 1930, he was elected trustee. He qualified for each of said offices, in turn, and is now the qualified and acting trustee of the estate of the bankrupt.

In the ordinary conduct of its business, and before any proceedings were had for its liquidation, the bankrupt purchased from *The Guaranty Company* of New York, negotiable bonds of Canadian National Railways of the par value of $5,000, notes of New York, Chicago & St. Louis Railway of the par value of $5000, bonds of the Texas Corporation of the par value of $8000, and bonds of Canadian National Railways of the par value of $5000. (Printed Record, p. 5 contains the list.)

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*NOTE: The opinion of the lower court (printed record p. 45) erroneously states that the bankrupt is a banking corporation. It was previously adjudged by the Circuit Court of Appeals for the Eighth Circuit that the bankrupt was forbidden by the law of its creation to do a banking business, and was not a banking corporation within the meaning of the clause of the bankruptcy act exempting banks from its operation. (*Gamble v. Daniel*, 39 Fed. 2d 447.) A petition for a writ of certiorari in that case was denied by the Supreme Court. (*Gamble v. Daniel*, Adv. Op. 1930 Term p. 15).

The bonds were delivered without payment, and soon thereafter in liquidation proceedings in a state court a receiver was appointed for and took over possession of the bankrupt's assets. After the adjudication of bankruptcy the bonds in question came into the custody of the petitioner pursuant to a turnover order issued by the bankruptcy court against John Gamble, the receiver of the state court. (*Gamble v. Daniel*, 39 Fed. 2d. 447.)

The bankrupt, Peters Trust Company, up to and at the time of its suspension kept a deposit account with the respondent, Guaranty Trust Company of New York. That account on suspension of business, November 25, 1929, showed a credit in favor of the bankrupt of $31,046.53. At the same time the bankrupt was indebted to the respondent on a demand loan account in the sum of $154,200.00. So the respondent, as it had a right to do, applied the bankrupt's credit balance of $31,046.53 as a credit on its demand loan account and made a counterbalancing debit of the same sum in the deposit account, and closed the latter account in balance. The right to make this setoff is not questioned. Statements of account rendered by respondent are the basis of the figures here given. (Printed Record, Exhibit A, pp. 16-18; Exhibit B, p. 41.)

The respondent held collateral security, deposited by the bankrupt, of a value largely in excess of the sum due on the bankrupt's demand loan account. Money collected on the excess collateral was the subject of the turnover order. An officer of the bankrupt, on November 26, 1929, at the office of the respondent, informed Mr. Curtis, a vice-president of respondent, that Peters Trust Company had been taken over by the State for liquidation in in-

solvency proceedings, and found that respondent had already been so advised. (Printed Record, pp. 14-15.) On the next following day, November 27, 1929, after Peters Trust Company was known to be in process of liquidation and to have committed an act of bankruptcy, and after it had impounded and applied Peters Trust Company's bank account as above stated, the respondent purchased the account of *The Guaranty Company* against the bankrupt. Obviously, an account so purchased after insolvency, pending a judicial proceeding for liquidation of the bankrupt, cannot be made the basis of a setoff against respondent's liability for the subsequent collection of excess collateral that had not been pledged to secure payment of the assigned account. (Bankruptcy Act. Sec. 68b.)

Respondent, as such assignee of the Guaranty Company, appeared voluntarily before the referee in bankruptcy and, on April 2, 1930, filed an application and petition for the reclamation of the aforementioned negotiable securities on the grounds that their sale was subject to rescission, because the purchase money was not paid in accordance with the terms of sale, and that their delivery to the bankrupt was obtained by fraud. (Printed Record, pp. 1-4.)

Your petitioner, the trustee in bankruptcy, on April 3, 1930, filed with the referee in bankruptcy an answer to respondent's petition for reclamation, in which he denied that the sale of the bonds and notes was conditioned on payment by the bankrupt contemporaneously with their delivery, and alleged their ownership by the bankrupt. The answer alleged that customers of the bankrupt had previously ordered and paid the bankrupt for certain of said securities, and claimed ownership, and asked that

they be made parties and directed to assert their claims, if they had any claims thereto.

The answer further alleged that respondent had in its possession $31,224.60 "which was accumulated by the receiver and trustee of said bankrupt estate since the date it was adjudicated bankrupt." It was alleged that respondent, upon demand of the trustee therefor, had failed to deliver the same to the trustee, and there was a prayer for an order on respondent to deliver to the trustee said funds collected by it on behalf of the bankrupt estate. (Printed Record, pp. 4-8.)

The record shows that on April 5, 1930, the referee made an order requiring the persons named in the trustee's answer, as claimants of certain of said securities, to appear by April 16, 1930, and set forth in writing any interests claimed by them, respectively, in said securities; that the order was served, and five of said persons presented their claims; the making of an order setting the matter for hearing on April 23, 1930, and an adjournment of the hearing to April 25, 1930, "at the request of H. M. Baldrige, attorney for the Guaranty Trust Company;" and the appearance of all parties, by attorney, at said last named date, when the matter was heard and determined by the referee. (Printed Record, pp. 18-19.)

Before the hearing on the merits was taken up, respondent's counsel moved orally to strike out the paragraphs of petitioner's answer alleging that customers of the bankrupt were claiming certain of the bonds and notes in question, and, that the respondent had collected and received money on behalf of the bankrupt estate since the adjudication of bankruptcy which it should deliver over to respondent as trustee. The referee overruled this mo-

tion, and counsel for respondent then dismissed its petition for reclamation, and made the following statement: "The Guaranty Trust Company, by its attorneys, aren't interested in this proceeding. We do not believe we are in court, and we are not interested to stay." (Printed Record, pp. 8-10.)

Counsel for respondent thereupon withdrew, and the referee proceeded with the hearing on the petitions of intervenors, and the answer of the petitioner, as trustee. (Printed Record, pp. 10-21.) A turnover order against respondent covering a balance of $23,724.60 was entered by the referee, based upon the following findings:

"And the court further finds that the Guaranty Trust Company has in its hands the sum of $23,724.60 in cash belonging to Herbert S. Daniel, trustee of the above named bankrupt; that said sum was accumulated by Herbert S. Daniel, as receiver, subsequent to February 12th, 1930, said moneys having been collected by said Guaranty Trust Company for and on behalf of said bankrupt estate from the Prudential Insurance Company of America, on mortgages made by the bankrupt and sold to the Prudential Insurance Company of America, and that said Guaranty Trust Company has not made herein any claim to the said fund of $23,724.60, and is merely holding the said sum of $23,724.60 as custodian and agent of Herbert S. Daniel, as trustee of the above named bankrupt, and that said sum should be delivered forthwith to said trustee." (Printed Record, p. 20.)

On respondent's petition for review the District Judge affirmed the order of the referee. (Printed Record, p. 26.) On appeal by respondent the decree affirming the referee's turnover order was, on May 4, 1931, reversed by the said United States Circuit Court of Appeals for the Eighth Circuit. (Printed Record, pp. 45-50.)

On the merits, the case presents a bald refusal by respondent to turn over to the trustee money collected by it for the estate of the bankrupt, after the date of the adjudication. There is no basis in the record for any contention that respondent made any adverse claim of ownership or lien on the fund in question, that would entitle it to an adjudication in a plenary suit. This statement has the plain and direct approval of the opinion of the Circuit Court of Appeals, delivered by MUNGER, D. J., as the following quotations show:

"Appellant does not question the authority of a bankruptcy court, through ancillary proceedings in the territorial jurisdiction of appellant's residence to order the delivery of the bankrupt's assets, but *appellant asserts that it was not subject to the order of the referee in this case, although it had filed a petition in reclamation before him.*" (Printed Record, p. 47.)

"No complaint was made of the facts found by the referee. Under these findings *there is no basis for any claim that the appellant was an adverse claimant,* both because no such claim was asserted, and because the referee found that the money in question was the bankrupt's, *and had been received after the bankruptcy proceedings had begun.*" (Printed Record, p. 47.)

The subject matter of the respondent's petition for reclamation, and of petitioner's answer presenting a cause for affirmative relief by a turnover order against respondent, was clearly within the summary jurisdiction of the referee. The sole question raised by the record is: Did the respondent by appearing voluntarily and invoking the summary powers of the referee for affirmative relief in the course of the administration of the bankrupt estate, *submit its person to the jurisdiction of the referee* for the purpose of determining a claim of the trustee for

relief set up in an answer to respondent's petition, and filed while respondent's petition was pending.

Petitioner maintains that jurisdiction of the subject matter and of the person of respondent had definitely attached, and respondent could not defeat that jurisdiction by a dismissal of its own petition after first obtaining an adverse ruling on a motion to strike the trustee's claim for affirmative relief from his answer. The dismissal at that stage left the case pending on the claim for affirmative relief tendered by the answer of the trustee, to which respondent had appeared by its motion to strike.

When jurisdiction of a suitor attaches by virtue of a voluntary appearance, consideration of the place of his domicile becomes immaterial. The circumstance that respondent is domiciled in the Southern District of New York gives it no license to play fast and loose with a referee in bankruptcy of the District of Nebraska. If respondent had prosecuted its petition for reclamation to a successful conclusion, it must obviously have taken its relief upon the equitable condition that it turn over to the trustee the money of the estate then in its hands. In the circumstances shown jurisdiction to make the turnover order against respondent was as full and complete as though respondent had been domiciled at Omaha, in the District of Nebraska.

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REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

The said United States Circuit Court of Appeals has, in said case, decided an important question of federal law which has not been, but should be, settled by this court.

The point so decided is: that one who, without claim of ownership or interest, withholds from a trustee in bankruptcy funds of the bankrupt estate, received on behalf of the trustee after the adjudication of bankruptcy, may voluntarily appear before the referee in bankruptcy and present a petition for reclamation of specific personal property, without being subject to an order of the referee (based on the trustee's answer in the same proceeding) to deliver over to the trustee the funds of the estate so wrongfully withheld.

Apparently that specific question of federal law has not been decided by this court. The question is obviously one of general public interest and concern. The question involves the interpretation of the bankruptcy act and has a sensitive bearing upon the orderly, economic and speedy administration of bankrupt estates, and, petitioner submits, should be authoritatively settled by this court.

II.

The said decision of the United States Circuit Court of Appeals for the Eighth Circuit is in conflict with the decision of the United States Circuit Court of Appeals for the Seventh Circuit rendered in Operators Piano Co. v. First Wisconsin Trust Co., 283 Fed. 904.

In the case in the Eighth Circuit, the decision here complained of is to the effect that one may become a petitioner for summary relief in a court of bankruptcy without subjecting himself to an order of the referee

based on the referee's determination of a cross-claim set up by the trustee in the answer.

In *Operators Piano Co. v. First Wisconsin Trust Co.*, 7 C. C. A. 283 Fed. 904, it was held that one who is himself a petitioner for relief in a summary proceeding in bankruptcy does subject himself to orders disposing of affirmative claims set up by the trustee in answer to his own petition.

The opinion of the Circuit Court of Appeals for the Eighth Circuit holds that there is no basis for a claim that respondent was an adverse claimant of the money in question and, necessarily, that the subject matter is within the summary jurisdiction of the referee, and then states respondent's contention as follows:

"There remains the question of whether the referee and the court below had the power to order this money to be turned over to the referee. Appellant does not question the authority of a bankruptcy court, *through ancillary proceedings in the territorial jurisdiction of appellant's residence,* to order the delivery of the bankrupt's assets, but appellant asserts that it was not subject to the order of the referee in this case, *although it had filed a petition in reclamation before him.*" (Printed Record, p. 47.)

The concluding words of the opinion are:

"We have been cited to no authority for the proposition that a creditor or other petitioner asking specific relief against a bankrupt's estate, as provided by the Bankruptcy Act, thereby becomes subject to summary orders by the referee in matters entirely disconnected from the subject matter of such claim or petition, and no such authority is believed to exist. Under the circumstances we think that the appellant's objections to the jurisdiction should have been sustained, and the order of the court

affirming the order of the referee will be reversed." (Printed Record, p. 49.)

In *Operators Piano Co. v. First Wisconsin Trust Co.*, 7 C. C. A., 283 Fed. 904, the court in the opinion by EVANS, C. J., said:

"Likewise, where the adverse claimant is himself a petitioner for relief in a summary proceeding. he opens the door to such defenses as the trustee in bankruptcy possesses, and all such issues and all such defenses (including affirmative claims) may be properly litigated in that summary proceeding. For a litigant cannot himself invoke the jurisdiction of the court and the particular form of proceeding (summary as well as plenary) and then object to the disposition of the issues which the respondent (the trustee) may raise, either as a defense to his petition, or as the basis of a counterclaim. The consent thus given cannot be subsequently withdrawn." The bracketed words are as they appear in the report.

In the instant case, the referee in bankruptcy at the original hearing, and the District Court upon review, maintained jurisdiction under the doctrine of the last cited case. The decision of the Circuit Court of Appeals for the Eighth Circuit, here complained of, denying jurisdiction, is in conflict with the decision in the case last cited.

The decision of the United States Circuit Court of Appeals for the Eighth Circuit is also in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in *In re Carl Dernburg & Son*, 5 Fed. (2d) 37, in which the court, answering an objection that the referee in bankruptcy was without power, in a summary proceeding, to determine a question of preference, said:

"Every person submitting himself to the bankruptcy court in the progress of the case for the purpose of hav-

ing his rights in the estate determined, makes himself a party to the suit and bound in the legitimate course of the proceeding." (5 Fed. 2d. 39.)

It is obvious that confusion and uncertainty in the administration of estates in bankruptcy will result from the apparent conflict in the decisions cited. Petitioner. therefore, submits that the question of federal law involved should be decided by this court so that the bankruptcy act may have a uniform operation in all of the federal courts.

III.

The said United States Circuit Court of Appeals, in said case, has rendered a decision involving the jurisdiction of referees in bankruptcy and the right of a trustee, by answer, to tender issues for affirmative relief, that so far departs from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of supervision.

References under this head are made to the established usage of taking issue by answer on petitions for summary relief before referees in bankruptcy; to the application in such cases of the rules and usages of equity; and to the propriety and necessity of according the same privilege of presenting affirmative claims by answer, in bankruptcy proceedings, that is expressly sanctioned by equity rule 30.

The orderly, economic and speedy administration of bankrupt estates requires recognition and application of these just and equitable usages. The interest of creditors is furthered by the speedy termination of controversies and the avoidance of a multiplicity of suits. A cardinal virtue of the reformed code of equity procedure in the federal courts, is the sanction of the presentation

of cross-demands by answer. That is a provision for the speedy settlement, in a single equity proceeding, of all issues capable of trial between the parties, even though they are not related. There appears no occasion, in bankruptcy proceedings, for adherence to archaic forms that were discarded by this court upon the adoption of the present equity rules. This court evidently recognized that the abandoned procedure, prescribed by the old rules, fostered and prolonged litigation, by restricting cross-demands of a defendant to matters that were germane to the subject of the bill, and requiring cross-bills for their presentation. We have not discovered any expression of this court, by decision, rule or order, favoring the continuance of the discarded, archaic forms of procedure, in proceedings before the courts of bankruptcy. The settlement by this court of the question of practice involved, at some time, in some proceeding in bankruptcy, is not only desirable, but seems to be a matter of urgent necessity.

The code of federal equity procedure prescribed by the present equity rules, is matchless in comprehensive brevity, removal of obstructive complications, and in its beneficent tendency to speed final determination of all equitable causes upon the merits. It has greatly advanced and popularized the federal equity forum. Its benign offices are as important to the speedy and orderly administration of estates in bankruptcy as to causes within the general jurisdiction of equity.

The decision of the Circuit Court of Appeals flatly denies the application of rule 30 to equitable administrations in bankruptcy, and stubbornly adheres to the ancient, discarded doctrine that no cross-claim is presentable

by answer that is not germane to the cause of action set forth in the original bill. Petitioner, therefore, submits that the decision is reactionary and obstructive of justice, and so far departs from the accepted and usual course of modern judicial procedure, as to call for an exercise of this court's power of supervision.

IV.

The United States Circuit Court of Appeals, in said case, has decided a federal question in a way probably in conflict with an applicable decision of this court in Robertson v. Howard, 229 U. S. 254-264.

Apparently, the opinion of the lower court holds that this case is ruled by *Babbitt v. Dutcher,* 216 U. S. 102, and *Elkus, Petitioner,* 216 U. S. 115, both holding to the effect that under the original bankruptcy act, as passed in 1898, the respective district courts have ancillary jurisdiction in aid of bankruptcy proceedings pending in another district. The theory of the decision here in question seems to be that since such ancillary jurisdiction exists, the court of primary jurisdiction is wholly without power to make a turnover order against any one who is domiciled without its territorial limits. It is submitted that such theory is unsound and in conflict with *Robertson v. Howard,* 229 U. S. 254.

Among other expression contained in the opinion in the instant case, evidencing the adoption and application of that untenable theory, are the following:

"The courts of bankruptcy may act in the exercise of their jurisdiction *in their territorial limits,* but there may be ancillary bankruptcy proceedings *in other districts,* in aid of the bankruptcy court exercising primary jurisdiction. Bank. Act. §2(20); *Babbitt v. Dutcher,* 216 U. S. 102; *Elkus, Petitioner,* 216 U. S. 115; *Lazarus v. Pren-*

tice, 234 U. S. 263. An order by the referee directing appellant, *as a resident of New York,* to surrender to the trustee property which it held there, would be beyond the ordinary powers of the referee. *Staunton v. Wooden,* 179 Fed. 61." (Printed Record, p. 47.)

"Appellant sought to recover certain bonds to which it claimed title. The trustee sought an order that appellant should pay over money of the bankrupt estate received by appellant, after bankruptcy. The proceedings would not have been more unrelated to each other, if the trustee had sought an order on appellant for the delivery of books and papers, such as was asked in *Babbitt v. Dutcher,* 216 U. S. 102, or an order for the examination of witnesses, such as was asked in *Elkus, Petitioner,* 216 U. S. 115." (Printed Record, p. 49.)

The ancillary jurisdiction, under the act as it was passed in 1898, is well settled by the cases cited; and, as if some doubt had still existed, subdivision 20 of Section 2 was added by amendment in 1910, investing courts of bankruptcy with express power to "exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

The bearing of this existing *ancillary* jurisdiction upon the issue involving the powers of the court of *primary* jurisdiction, was wholly misconceived and misapplied by the Circuit Court of Appeals. The existence of the ancillary jurisdiction presupposes and affirms jurisdiction of the primary court over the subject of the proceeding. Aid of the existing primary jurisdiction of another court, is the sole and exclusive object for creation of the ancillary jurisdiction. Ancillary jurisdiction can only be exercised by one district court when primary juris-

diction exists in another bankruptcy court. Where one against whom relief is sought is not within the reach of the process of the primary court, resort to the ancillary jurisdiction of the court of his domicile becomes necessary. But such resort is not required where the non-resident party *voluntarily appears* in the court of primary jurisdiction, and presents a petition for summary relief in his own behalf.

The decision by the lower court of the question now under consideration is at war with the holding of this court in *Robertson v. Howard,* 229 U. S. 254, 264, in which it was said in the opinion by Mr. Chief Justice White:

"Even if the enlarged powers of a court of bankruptcy over the estate under its control be put out of view, and the subject be looked at as a mere question of equitable jurisdiction, it may not be doubted that a court of equity in one state, in a proper case, could compel *a defendant before it* to convey property situated in another state. *Fall v. Eastin,* 215 U. S. 1, 8, et seq. 54 L. Ed. 65, 69; 23 L. R. A. (N. S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853, and cases cited. There being thus ample power in the court, it follows, of course, that resort to ancillary proceedings was unnecessary. The decision in *Babbitt v. Dutcher,* 216 U. S. 103, 54 L. Ed. 402, 30 Sup. Ct. Rep. 372, 17 Ann. Cas. 969, to the effect that district courts, other than the court in which the original proceedings in bankruptcy are instituted, possess power in proper cases to exert ancillary jurisdiction in aid of the court in which the bankruptcy proceedings are pending, lends no support to the contention that the court which had full power could not exert its ample authority without invoking the ancillary power of another and different court." (229 U. S. 261-262.)

The opinion of Mr. Chief Justice White, from which the foregoing excerpt is taken, is an authoritative precedent, condemning the decision of the Circuit Court of

Appeals, and upholding that of the referee and the District Court. It condemns the theory of the decision of the Circuit Court of Appeals that because it was possible for the trustee to resort to the ancillary jurisdiction of the District Court for the Southern District of New York, the District Court for the District of Nebraska could not exert its ample authority against the Guaranty Trust Company, *that was already before it with a petition of reclamation,* to make a turnover order involving a fund in its hands, collected for the bankrupt estate, after the adjudication of bankruptcy. The opinion of the Chief Justice here cited and relied upon, renders all citations of the lower court, maintaining ancillary jurisdiction, immaterial and inapplicable, and leaves the judgment of the lower court unsupported and foundationless.

A short argument maintaining the reasons here assigned for granting the writ is submitted in the brief accompanying this petition.

For the reasons stated, it is submitted that a writ of certiorari should be allowed and that the questions involved should be decided by this court.

Wherefore, your petitioner prays that a writ of certiorari may issue out of and under the seal of this honorable court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify the above stated cause to this court for review and determination, as provided by law, and that your petitioner may have such other and further relief in the premises as to this court may seem appropriate.

HERBERT S. DANIEL,
Trustee of Peters Trust Company, Bankrupt,
Petitioner.

HALLECK F. ROSE,
ARTHUR R. WELLS,
PAUL L. MARTIN AND
WINTHROP B. LANE,
Counsel for Petitioner.

STATE OF NEBRASKA
DOUGLAS COUNTY } ss.

I, Halleck F. Rose, being duly sworn depose and say on oath that I am one of the counsel for the petitioner named in the foregoing petition, and that I have read the petition and know the contents thereof, and the facts therein stated are true to the best of my knowledge, information and belief.

HALLECK F. ROSE.

Subscribed in my presence and sworn to before me, this 10th day of June, 1931.

Seal

WINFIELD R. ROSS,
NOTARY PUBLIC.

COUNSEL'S CERTIFICATE OF MERIT.

I hereby certify that I have examined and read the foregoing petition for a writ of certiorari and that in my opinion such petition is well founded and should be granted by this Honorable Court, and that said petition is presented in good faith and is not filed for delay.

HALLECK F. ROSE.
Of Counsel for Petitioner.

June 10, 1931.

In the Supreme Court of the United States

OCTOBER TERM, 1931

HERBERT S. DANIEL, TRUSTEE OF PETERS TRUST COMPANY,

Petitioner,

v.

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

The incidental questions involving the jurisdiction of courts of bankruptcy (including referees exercising the powers of such courts under §38, subd. 4) have been settled in favor of the bankruptcy court's jurisdiction of the subject matter of respondent's petition for reclamation, and of petitioner's cross claim by answer for a turnover order against respondent.

This case is not a controversy between a trustee and an adverse claimant concerning property claimed by the trustee, which, unless by consent of the defendant, must be determined in a plenary suit brought by the trustee in a court in which the bankrupt might have brought it if bankruptcy had not intervened. The record, as stated and cited in the foregoing petition for a writ of certiorari, the findings of the referee approved by the District Judge, and the opinion of the Circuit Court

of Appeals, all show that the money ordered turned over by respondent to the trustee was, confessedly, the money of the estate, collected by respondent after the adjudication of bankruptcy, and to which respondent made no claim of ownership. The jurisdiction is not, therefore, governed by §23 of the Bankruptcy Act, relating to plenary suits by trustees against adverse claimants of property that is claimed by a trustee.

Section 2(7) of the Bankruptcy Act invests courts of bankruptcy with jurisdiction at law and in equity to "cause the estates of bankrupts to be collected, reduced to money and distributed, *and determine controversies in relation thereto, except as herein provided.*"

Section 33 creates the office of Referee; and Section 38(4) invests the referee with jurisdiction to:

"perform such part of the duties, except as to questions arising out of the applications of the bankrupt for composition or discharge, *as are by this act conferred on courts of bankruptcy of their respective districts,* except as herein otherwise provided."

Section 36 prescribes the same oath for referees as that prescribed for judges of United States courts.

This court has determined by its well considered judgments, that issues of the class now under consideration do not come under any of the exceptions of the bankruptcy act of questions reserved from the general powers conferred upon referees, and that the referee has power to act in the first instance on such matters and make a summary turnover order. (*Mueller v. Nugent,* 184 U. S. 1-18; *Harrison v. Chamberlain,* 271 U. S. 191-195.)

Section 70(a) of the Bankruptcy Act vests in the trustee the property and rights, real and personal be-

longing to the bankrupt, as of the date he was adjudged a bankrupt.

The money affected by the referee's order in the present case was, by operation of the statute, placed in the constructive possession of the bankruptcy court from the date of its receipt by respondent. The excess collateral mortgages from which the money was derived were in constructive possession of the court from the date of the adjudication in bankruptcy. The conceded facts preclude the possibility of acquisition by respondent of any adverse right in the money collected on the excess collateral. The balance in its hands, and its receipt subsequent to the adjudication of bankruptcy, were determined from the respondent's own statement of account rendered to the trustee and the money ordered turned over was that which remained in its hands, after respondent had applied $156,700.00, plus interest, in full payment of the demand loan account of the bankrupt. There can be no complaint against the merits of an order based upon an acceptance of respondent's own accounting, which confesses the retention of money of the estate that came to its hands after the adjudication.

The matters mentioned under this head are not dwelt upon in this brief, for the reason that they have been previously determined by this court, in favor of the general jurisdiction of the courts of bankruptcy and the referee's jurisdiction of the subject matter of the order complained of is not open to reasonable question. These points also appear to be conceded by the Circuit Court of Appeals, in its opinion. We, therefore, confine our presentation to the questions involved in the holding that the bankruptcy court was without jurisdiction of the person of the respondent.

II.

The Bankruptcy Act, in terms, confers equity jurisdiction upon courts of bankruptcy.

The presentation by the trustee of the cross-demand in his answer to the respondent's petition for reclamation, and the power of the court to determine the issue so presented, are sanctioned by equity rule 30 and General Order in Bankruptcy XXXVII.

Jurisdiction of the bankruptcy court over the person of respondent was obtained by its voluntary appearance and the presentation of its petition for reclamation.

Respondent's withdrawal after the issues had been made up and the hearing entered upon did not defeat the jurisdiction, previously attached, to determine the issue raised by the answer of the trustee.

Section 2 of the Bankruptcy Act provides that courts of bankruptcy:

"are hereby invested within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law *and in equity* as will enable them to exercise *original jurisdiction in bankruptcy proceedings*, in vacation in chambers, and during their respective terms as they are now or may be hereafter held, to * * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, *and determine controversies in relation thereto*, except as herein otherwise provided."

Subject to certain specific exceptions that are not involved in the instant case, original equity jurisdiction "to determine controversies in relation" to collection, reduction to money, and distribution of the estates of bankrupts, is thus expressly conferred upon courts of bankruptcy.

As stated in *Fidelity Trust Company v. Gaskell*, 195 Fed. 865, at 871, C. C. A. 8, "A proceeding in bankruptcy

is a proceeding in equity and a district court sitting in bankruptcy, whether in exercising its primary or ancillary jurisdiction, is a court of equity."

Section 38 (4), quoted in division I of this brief (ante, p. 20) confers upon referees, subject to exceptions not here involved, jurisdiction to perform such part of the duties as are conferred on courts of bankruptcy of their respective districts.

Section 30 refers to the Supreme Court of the United States the duty of prescribing rules, forms and orders as to procedure for carrying the act into force and effect.

This court by No. XXXVII of the General Orders in Bankruptcy, adopted in conformity to said §30, prescribed the following rule of practice:

"In the proceedings in equity instituted for the purpose of carrying into effect the provisions of the act, *or for enforcing the rights and remedies given by it*, the rules of equity practice established by the Supreme Court of the United States shall be followed, as nearly as may be * * *."

Obviously, except as the privilege of modification is granted to facilitate speedy hearings, the rules of equity practice are applicable, without limitation or reservation, to all equitable proceedings in courts of bankruptcy. Some of the inferior federal courts have disregarded the rules of equity practice in equitable proceedings in bankruptcy, or have asserted that their application is limited and not authoritative. But the order quoted makes it mandatory for courts of bankruptcy to follow the equity rules in all proceedings in equity, as nearly as may be.

Upon the foundation of the quoted statutory delegations of jurisdiction, and the general order XXXVII

establishing rules of procedure, petitioner invokes the following provision of equity rule 30:

"The answer *must* state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and *may* without cross-bill set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-bill, so as to enable the court to pronounce a final judgment in the same suit on both the original and cross-claims."

In *American Mills Co. v. American Surety Co.*, 260 U. S. 360, 365, this court in an opinion by MR. CHIEF JUSTICE TAFT, delivered the following exposition of the quoted provision of equity rule 30:

"The counter-claim and the set-off and counter-claim in the two clauses are in *pari materia* except that the first grows out of the subject matter of the bill and the other does not. That which grows out of the subject matter of the bill must be set up in the interest of an end of litigation. That which does not may be set up, if the defendant wishes, in one proceeding in equity, quickly to settle all equitable issues capable of trial between them in such a proceeding, even though they are not related."

The proceeding for the adjudication of bankruptcy is an equitable proceeding. It is an administration suit, and the adjudication vests the trustee with title to the property of the bankrupt, and places it in the exclusive custody and control of the court of bankruptcy, and throws upon that court the duty of collecting, reducing to money and distributing the estate of the bankrupt, and of determining controversies relating thereto. These are equitable powers for performance of which the Congress very properly invested courts of bankruptcy with jurisdiction in equity.

Suits for administration, other than in bankruptcy, have furnished frequent occasions for resort to the general jurisdiction of equity. It is the settled rule of this court that when an equity court in such a suit takes control of property for the purpose of administration or liquidation, it thereby withdraws such property from the jurisdiction of all other courts, and draws to itself incidental jurisdiction to hear and determine all questions respecting the title, possession or control of such property. This court has applied that rule to protect and enforce the paramount and exclusive jurisdiction of courts of bankruptcy over the property of bankrupt estates, actually or constructively in their possession or control. (*Murphy v. John Hofman Co.*, 211 U. S. 562; *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734; *White v. Schloerb*, 178 U. S. 542; *Dayton v. Stanard*, 241 U. S. 588.)

A summary and accurate statement of the rule that in such cases the primary jurisdiction is exclusive, as applied by this court in bankruptcy proceedings, is embraced in the opinion of Mr. Justice Roberts in *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734, as follows:

"Upon adjudication title to the bankrupt's property vests in the trustee with actual or constructive possession and is placed in the custody of the bankruptcy court. *Mueller v. Nugent*, 184 U. S. 1, 14, 46 L. Ed. 405, 411, 22 S. Ct. 269. The title and right of possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. *Robertson v. Howard*, 229 U. S. 254, 259, 260, 57 L. Ed. 1174, 1177, 33 S. Ct. 854; *T. E. Wells & Co. v. Sharp*, 125 C. C. A. 46, 208 Fed. 383; *Galbraith v. Robertson-Hilliard Grocery Co.*, 133 C. C. A. 46, 216 Fed. 842, 32 Am. Bankr. Rep. 752. It follows that the bankruptcy court has exclusive jurisdiction to deal

with the property of the bankrupt estate. It may order a sale of real estate lying outside the district. *Robertson v. Howard*, 229 U. S. 254, 259, 260, 57 L. Ed. 1174, 1177, 33 Sup. Ct. 854, supra; *Re Wilka* (D. C.) 131 Fed. 1004. When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts. *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 20 S. Ct. 1007; *Murphy v. John Hofman Co.*, 211 U. S. 562; 53 L. Ed. 237, 29 S. Ct. 154; *Dayton v. Stanard*, 241 U. S. 588, 60 L. Ed. 1190, 36 S. Ct. 695. This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property. *Murphy v. John Hofman Co.*, 211 U. S. 562, 53 L. Ed. 327, 29 S. Ct. 154, supra; *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 52 L. Ed. 379 28 S. C. 182; *Harkin v. Brundage*, 276 U. S. 36, 72 L. Ed. 457, 48 S. Ct. 268."

It is thus settled by the statutes, rules, orders and decisions, cited above, that jurisdiction in equity is conferred on courts of bankruptcy. The administration of a bankrupt estate is an equitable proceeding. The adjudication of bankruptcy places the property of the bankrupt actually or constructively within the control of the bankruptcy court. The jurisdiction of equity, having once attached, remains for all purposes to the end of the proceeding. The exclusive control of the property draws to the court the power to determine all controversies concerning its title, possession and control. In one respect, at least, the equity power of courts of bankruptcy is broader than the general equity jurisdiction of the federal courts. A court of bankruptcy may, by injunction, stay

proceedings in state courts, and that power is denied to federal courts of general equity jurisdiction.

The cases cited hold that property in possession of a trustee in bankruptcy can not be reclaimed by replevin or any form of action at law or in equity, in any court other than the bankruptcy court of primary jurisdiction. All such controversies are drawn to the bankruptcy court, as an incident of its equitable proceeding for administration and distribution of the property of the bankrupt.

Respondent's only resort for reclamation of property in the actual or constructive possession of the trustee, as an officer of the court, was the presentation of a petition in the equitable proceeding in the bankruptcy court. If a petition to reclaim property in the custody of an equity receiver had been presented to a court exercising general equity powers, the right of the receiver to present a cross-claim by answer, that also involved property rights of the estate in receivership, could not be doubted, in view of equity rule 30. In such case the claim of the petitioner, and the cross-claim of the receiver or trustee, are both, in fact, claims for reclamation of property in the actual or constructive possession and control of the court. Jurisdiction to determine all controversies in relation thereto resides in the bankruptcy court of primary jurisdiction. Petitioner, therefore, maintains that by virtue of equity rule 30 and general order in bankruptcy XXXVII the trustee was authorized to present his cross-demand for delivery of money constructively in *custodia legis*, whether related or unrelated to the subject matter of respondent's petition for reclamation, and whether the proceeding was summary or plenary.

Where the court of bankruptcy has power to determine a controversy in a summary proceeding, the trustee ought not to be, and cannot rightfully be denied the privilege of presenting a claim, by answer, that he could exercise under equity rule 30, if the same identical issue tendered by respondent were presented in a plenary suit in equity for rescission of the sale of the bonds, and for an order for their delivery by the trustee to respondent.

III.

By General Order XXXVII the rules of equity practice are made applicable, without limitation, to be followed "as nearly as may be" in all "proceedings in equity instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it."

We discover no restrictive words limiting the applications of this order in proceedings in bankruptcy. On the contrary its terms are general and all embracing. The order makes applicable the rules of equity, in all proceedings in equity instituted either for the purpose of carrying into effect the provisions of the bankruptcy act, or for enforcing any right or remedy given by the act. Surely the terms thus employed by this court are broad enough to include every branch of the equity jurisdiction conferred upon and exercised by the courts of bankruptcy, whether primary or ancillary, plenary or summary. The words are so general and comprehensive that it is not possible to spell out of them any restrictions or limitations that make them inapplicable to any sort of a proceeding in equity of which courts of bankruptcy are invested with jurisdiction.

The denial by the Court of Appeals in the present case of the right of the trustee to present his cross-demand

by answer, gives occasion to thus recall the general and comprehensive terms of Order XXXVII. The desirability and urgency of a settlement by this court of the meaning, application and scope of that order are emphasized by repeated refusals of inferior federal courts to apply the rules of equity practice in equitable proceedings in courts of bankruptcy, and by apparent conflicts of decisions upon the question of their applicability. We here cite a few illustrative cases.

In *re Cunney* (D. C. Mass.) 225 Fed. 428, the court said:

"General Order No. XXXVII, applies only to equity proceedings, *properly so called*, and not to summary proceedings in bankruptcy like this" (objections to the discharge of the bankrupt.).

In *International Harvester Co. v. Carlson* (8 C. C. A.) 217 Fed. 739, it was said:

"We do not think that general equity rules can be applied as rules of court in the performance of the administrative work of courts of bankruptcy. They may be looked to for analogies, but not as rules. The Supreme Court, itself, has fixed the rules to govern courts of bankruptcy."

In *re Hughes* (2 C. C. A.) 262 Fed. 501, it is said:

"We approve of the decision in *International Harvester Co. v. Carlson*, 217 Fed. 736, 133 C. C. A. 430, and hold that the equity rules of the Supreme Court are not rules of court, affecting the administrative work of bankruptcy."

In *No-Leak-O Piston Ring Co. v. Norris*, (2. C. C. A.) 277 Fed. 951, it is said:

"The equity rules are of limited application in bankruptcy (*In re Hughes*, C. C. A. 262 Fed. 500), yet they

furnish a guide to procedure, and this was just as true before the promulgation of the present equity rules as it is now."

In view of some of the holdings of the inferior federal courts, Mr. Remington in his work on Bankruptcy states:

"This general order (No. XXXVII) has been construed to refer only to suits and proceedings other than the proceedings in bankruptcy themselves, in other words, to suits and proceedings brought in the federal courts in aid of bankruptcy proceedings." (1 Remington Bankruptcy, 3rd Ed. §31.)

Petitioner maintains that general order XXXVII does not admit of such an interpretation. To hold that this order applies only to plenary suits in equity brought in district courts, as distinguished from bankruptcy proceedings, would render the order itself wholly inoperative; because the equity rules by their own inherent force govern the practice in all such plenary suits. The order adopting the equity rules would be purposeless, if so construed, since the existing equity rules apply to all equity proceedings that invoke the general equity powers of the District Courts.

The general and comprehensive terms of the order in question leave no room for the process of interpretation. The order contains no words of limitation that restrict its operation to plenary or ancillary suits invoking the general equity powers of the District Courts. The terms employed may imply a limitation of the order to proceedings *in courts of bankruptcy*. It was only in such proceedings that there was any occasion for the order. It was only "for carrying this act into force and effect" that §30 of the bankruptcy act placed upon this court the

duty of prescribing "all necessary rules, forms and orders as to procedure."

There is no departure from this object upon the face of the order requiring conformity to the equity rules. To the contrary, the order employs apt terms to cover the object expressed in §30 of the bankruptcy act. It makes the equity rules of practice apply to proceedings "instituted for the purpose of carrying into effect the *provisions of this act, or for enforcing the rights and remedies given by it.*" Action upon petitions in bankruptcy, voluntary and involuntary, and the various proceedings incident thereto, must be had in the courts of bankruptcy; and when of an equitable nature, as are most of such proceedings, the General Order XXXVII prescribes the equity rules of practice.

It is submitted that in this case the referee and the district judge properly applied equity rule 30 by refusing to strike and by determining the cross-demand presented by the answer of the trustee; and that this court cannot, with due regard to its high power and dignity, sanction the misreading or false interpretation of General Order XXXVII indulged by the Circuit Court of Appeals in this case.

It is further submitted that even if the petitioner has misconceived the purpose and effect of the said general order, and the general equity rules in the case at bar are only to "be looked to for analogies," there is still ample reason for approving the procedure followed by the referee and District Court and rejected by the Circuit Court of Appeals. The reasons for applying this simplified form of procedure in bankruptcy cases are developed in other sections of this brief.

IV.

The decision in the instant case is in conflict with the decisions of Court of Appeals for the Seventh Circuit in Operators Piano Co. v. First Wisconsin Trust Co., 283 Fed. 904, and In re Barnett, 12 Fed. 2d. 73.

The conflict is sufficiently shown by the citations and the portions of the opinion copied in the petition for the writ, under the second reason assigned for its allowance.

The Court of Appeals for the Seventh Circuit has, however, reaffirmed its holding in *Operator's Piano Company v. First Wisconsin Trust Co.* in the later case of *In re Barnett*, 12 Fed. 2d. 73, as follows:

"We have consistently upheld the jurisdiction of the bankruptcy court to determine controveries either in summary or in plenary proceedings, where the adverse party either invokes the jurisdiction or consents to a trial of the disputed issues in such proceedings. *Operator's Piano Co. v. First Wisconsin Trust Co.*, C. C. A. 283, Fed. 904. And we might add that we think greater business efficiency and a more speedy administration of estates, together with greater uniformity in rulings, would be attained if all such controversies could, regardless of the objection of the adverse party, be determined in the bankruptcy court, the court having jurisdiction to administer bankrupt estates."

Thus in the Seventh Circuit the Court of Appeals has decided that courts of bankruptcy may determine controverted issues of fact on cross-demands of a trustee pleaded by answer, against a party who is himself a petitioner for relief, either in summary or plenary proceedings. In the situation exhibited by the present record, the courts of bankruptcy in the Seventh Circuit obtain jurisdiction of the person of petitioners for relief, for the purpose of determining cross-demands of the

trustee pleaded by answer; while by the decision of Court of Appeals of the Eighth Circuit, here complained of, such jurisdiction is denied to the courts of bankruptcy of the Eighth Circuit.

The operation of the bankruptcy act should, as a matter of course, be uniform in all of the federal courts; and such uniformity can only be attained by the settlement of the question by this court. That situation, it is submitted, makes the allowance of the writ a matter of urgency.

V.

Courts of bankruptcy in exercise of their equity powers act in personam and have summary jurisdiction where a party voluntarily appears or can be served with process, regardless of the location of the res or domicile of the party.

Respondents' withdrawal did not deprive the court of jurisdiction to determine the cross-claim of the trustee.

The bankruptcy court has power to make an order concerning the disposition of property of the bankrupt against a party actually before it, either by voluntary appearance or by service of process. To this effect is the decision of this court in *Robertson v. Howard*, 229 U. S. 254, 264, cited in the accompanying petition under the fourth reason assigned for allowance of the writ. The power of the bankruptcy court of primary jurisdiction to order the conveyance of real estate situate in another state was maintained by that decision. The case was cited and its doctrine reaffirmed in the opinion by Mr. Justice Roberts in *Isaacs v. Hobbs Tire & Timber Co.*, 282 U. S. 734. Other cases holding that orders for delivery or other disposition of the property of bankrupts are essentially equitable in their nature and act in personam and are

therefore valid, although the situs of the res is without the district, are: *Alco Film Corp v. Alco Film Service* (2 C. C. A.), 234 Fed. 55, 57; *Orinoco Iron Co. v. Metzel* (6 C. C. A.), 230 Fed. 40; *In re Britannia Mining Co.* (D. C. Wis.), 197 Fed. 459.

Staunton v. Wooden (9 C. C. A.) 179 Fed. 61, cited in the opinion of the lower court herein, is not in conflict with the doctrine here maintained, nor with the cases last above cited. There was no voluntary appearance by Staunton. He resided without the district in which the bankruptcy proceeding was pending, and an order to show cause was served without the district. Staunton's only appearance was special for objecting to the jurisdiction. It was ruled that the court could not send its process without the District. That holding is not a precedent for the instant case, where respondent voluntarily appeared by a petition for relief in his own behalf. Here respondent was already before the court in an equitable proceeding, and under the reformed practice in equity had submitted its person to the jurisdiction of the court to determine the cross-claim presented in the trustee's answer to its own petition.

Respondent stayed tenaciously before the court in the prosecution of its petition for reclamation up to the time of the court's taking up the hearing. The trustee and claimants to certain of the securities in question had appeared by counsel and filed pleadings. At the hearing respondent's counsel dismissed its petition and announced that it was not interested. The withdrawal at that stage did not oust the court of jurisdiction of its person that had previously attached, for the purpose of determining the issue raised by the trustee's cross-claim.

Respondent could not defeat the jurisdiction over this incident of a proceeding that it had initiated. *Operator's Piano Co. v. First Wisconsin Trust Co.* (7 C. C. A.), 283 Fed. 904, 906; *Triangle Electric Co. v. Foutch*, (8 C. C. A.) 40 Fed. (2d), 353, 356; *In re Dernburg & Son, Inc.* (2 C. C. A.), 5 Fed. (2d) 37; *In re Pennsylvania Coffee Co.* (D. C. Pa.), 8 Fed. (2d) 98; *In re Bennett* (7 C. C. A.), 285 Fed. 351.

It is submitted, therefore, that the bankruptcy court had jurisdiction to make the order in question. The order acted on the person of the respondent and was valid without reference to the situs of the res, or to the possible necessity of subsequent ancillary proceedings in the Southern District of New York for its enforcement.

VI.

Equitable terms may be imposed by a court as a condition of granting an order of reclamation.

In *Re Hooven-Owens-Rentschler Co.* (6 C. C. A.) 195 Fed. 424, a petitioner for a rescission of a sale and for the reclamation of personal property was under obligation to account for money received in part payment. In approving a referee's order conditioning reclamation on the delivery to the trustee of the money for which petitioner was accountable, the Court said, p. 426:

"We find then, that petitioner, a resident of Ohio (the bankruptcy administration being in Michigan), was, if it rescinded the sale, liable to account to the bankruptcy trustee for the $560.00 received, and was subject to be sued at law *or in equity* in any court having personal jurisdiction over the petitioner. Under these circumstances petitioner invoked the action of the bankruptcy court in the general subject matter. Full personal jurisdiction over it was thereby acquired, and there was nei-

ther lack of jurisdiction nor abuse of discretion in directing, in that very proceeding, that petitioner should respond to the trustee for any such liability which in fact subsisted."

VII.

The final decision of the Court is not a test of jurisdiction.

The jurisdiction of the bankruptcy court to decide the issues was not dependent upon the nature of its decision for or against the claimed right of reclamation, nor upon whether its order acting in personam could be enforced within the district where the court sat. It may be conceded that such an order could not be enforced by direct process if the party against whom it ran departed from and kept without the district. That would be true whether he was domiciled within or without the district. A contingency might arise in either case making resort to ancillary proceedings in another district necessary, as was done in *In re Small Shoe Co.* (2 C. C. A.), 5 Fed (2d) 956. An order acting in personam against a party who is actually before the court, by appearance or process, is nevertheless valid.

VIII.

CONCLUSION.

The questions involved should be settled by this court.

Prompt administration is required by the bankruptcy act. The act makes ample provisions to facilitate the administration and distribution of bankrupt estates. That purpose has been frequently emphasized by this court in its decisions under the Act of 1898, and also under the Act of 1867. The arm of the bankruptcy court should be the last, of all courts exercising equity powers, to be fettered by unnecessary restrictions in matters of form

and procedure. As far as possible the bankruptcy court of primary jurisdiction should be left free to promptly exercise its statutory authority to determine all questions concerning the collection and distribution of bankrupt estates.

The repeated holdings of this court are to the effect that referees in bankruptcy have summary jurisdiction to require the delivery to the trustee of the bankrupt's property in the hands of any person not having an adverse claim thereto; and also to determine adverse claims where the property is actually or constructively in the trustee's possession. (*Mueller v. Nugent,* 184 U. S. 1; *May v. Henderson,* 268 U. S. 111; *Harrison v. Chamberlain,* 271 U. S. 191.

Uniformity of operation of the bankruptcy act in all the federal courts is an imperious necessity, if the cardinal objects of the act are to be realized. Obvious conflicts in the decisions of the inferior federal courts have confused and hampered and prolonged the administration of bankruptcy estates and have promoted extended litigation, that could be and should be avoided.

Shall General Order XXXVII be applied in courts of bankruptcy and in bankruptcy proceedings, as distinguished from plenary suits invoking the general equity powers of District Courts? Section 30 of the bankruptcy act assigns to the Supreme Court of the United States the function of making orders to govern the practice in courts of bankruptcy; and the general order in question appears, in terms, to adhere to the statute.

If the equity rules of procedure are to be followed as near as may be in equitable proceedings in courts of bankruptcy, it is apparent that the discarded require-

ment that cross-demands must be germane to the subject matter of the original petitioner's cause of action, is not a rule of practice in such courts.

There is certainly as much need to simplify the practice in bankruptcy and to facilitate the settlement of cross-demands in one proceeding, as there is in proceedings under the general equity powers of the District Courts.

The new equity rules effected a great and needed reform in the general practice of equity. This court has apparently, by General Order XXXVII, extended the reformation to courts of bankruptcy for the purpose of simplifying and expediting their proceedings. Will this court suffer the nullification of its progressive rules and orders?

This court is the sole repository of power to enforce uniformity of operation of the bankruptcy act in all of the Federal Courts. It has not decided the question on which the inferior federal courts have divided. It is, therefore, submitted that the writ of certiorari should be granted, and that this court should exercise its supervisory powers by a review of the proceedings, for the purpose of settling the important questions of federal law involved, that have not been, but should be, settled by it.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 179.

HERBERT S. DANIEL, TRUSTEE OF PETERS TRUST COMPANY, BANKRUPT,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

BRIEF OF PETITIONER

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The opinion of the Circuit Court of Appeals is reported in 49 Fed. (2d) 866. The opinion of the District Court is not reported.

This case comes before this Court on the writ of certiorari granted October 19, 1931.

In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 179.

HERBERT S. DANIEL, TRUSTEE OF PETERS TRUST COMPANY, BANKRUPT,
Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK,
Respondent.

BRIEF OF PETITIONER

STATEMENT OF THE CASE

Peters Trust Company was organized under the Laws of the State of Nebraska, with its principal place of business at Omaha, Nebraska, and conducted a mortgage loan, bond brokerage, and general trust business. It was not a banking corporation, as inadvertently stated in the opinion of the Circuit Court (R. 45) and was, therefore, subject to the Bankruptcy Act. *Gamble vs. Daniel,* (8 CCA) 39 Fed. (2d) 447.

On November 25, 1929 an insolvency proceedings was started in the State Court and Peters Trust Company was adjudicated insolvent and a receiver appointed to liquidate its affairs. On November 27, 1929, an involuntary petition was filed in the United States District Court for the District of Nebraska at Omaha by certain of its creditors to have it adjudicated a bankrupt. While this action was pending, on December 10, 1929, Peters Trust Company filed a voluntary petition for adjudication in bankruptcy in the same Court and was thereupon, on December 10, 1929, adjudicated bankrupt, and on the same day Herbert S. Daniel was appointed and qualified as receiver of the bankrupt. Later, on March 17, 1930, Herbert S. Daniel, the petitioner herein, was elected and qualified as trustee in bankruptcy and is still acting as such trustee.

Three separate corporations are referred to in these proceedings: first, Peters Trust Company, which will be designated in this brief as the bankrupt; second, The Guaranty Company of New York, which conducts a bond and security business with its principal office in New York and with branch offices in other cities; third, The Guaranty Trust Company of New York, the respondent herein, which operates a bank and trust business in New York.

In the ordinary conduct of its business on November 18, 1929, before the proceedings for liquidation were started, the bankrupt purchased from *The Guaranty Company* Canadian National Railway bonds of the par value of $10,000.00, New York, Chicago & St. Louis Railway notes of the par value of $5,000.00, and Texas Corporation

bonds of the par value of $8,000.00. These securities were delivered in the regular course of business without payment and, soon thereafter, the insolvency proceeding was brought in the State Court for the liquidation of the Bankrupt and a receiver was appointed who took possession of the bankrupt's assets. After the adjudication in bankruptcy, the securities in question came into the custody and possession of the petitioner, pursuant to the turnover order issued by the Bankruptcy Court against the State Court receiver. *Gamble vs. Daniel,* (8 CCA), 39 Fed. (2d) 447.

The bankrupt up to and at the time of its suspension kept a deposit account with the respondent, Guaranty Trust Company of New York. That account on suspension of business, November 25, 1929, showed a credit in favor of the bankrupt of $31,046.53. At the same time the bankrupt was indebted to the respondent on a demand loan account in the sum of $154,200.00. The respondent, as it had a right to do, applied the bankrupt's credit balance of $31,046.53 as a credit on its demand loan account made a counter-balancing debit of the same sum in the deposit account, and closed the latter account in balance. The right to make this setoff is not questioned. The statements of account rendered by respondent are the basis of the figures here given (Exhibit A, R. 16-18; Exhibit B, R. 41).

The respondent held collateral security, deposited by the bankrupt, of a value largely in excess of the sum due on the bankrupt's demand loan account. The bankrupt was the loan correspondent of the Prudential Insurance Company of America for this district and cleared the

loans made for the Insurance Company through the respondent. On the morning of November 25, 1929, respondent had mortgages of the par value of approximately $156,000.00 in the course of clearing with the Insurance Company. All of these mortgages were ultimately cleared and the respondent collected the face of the mortgages plus the accrued interest for the account of the petitioner. After setting off, as it had a right to do, the amount due it from the bankrupt on its demand loan account, and fully satisfying said account, the respondent on February 13, 1930, held a balance for the petitioner of $3,272.20 (R. 17-18). This was increased by subsequent collections to $31,224.60 on March 14, 1930 after all the loans had cleared. The money collected on this excess collateral was the subject of the turnover order now in question.

As above noted, the bankrupt's checking account was impounded and applied by the respondent on the demand loan account on November 25, 1929. On November 26, 1929, an officer of the bankrupt called at the New York office of the respondent and informed Mr. Curtis, a vice-president of respondent, that Peters Trust Company had been taken over by the State for liquidation in insolvency proceedings, and found that respondent had already been so advised (R. ~~14-15~~ 15-16). On the next following day, November 27, 1929, after Peters Trust Company was known to be in process of liquidation and to have committed an act of bankruptcy, and after it had impounded

and applied Peters Trust Company's bank account as above stated, the respondent purchased the account of The Guaranty Company against the bankrupt. Obviously, an account so purchased after insolvency, pending a judicial proceeding for liquidation of the bankrupt, cannot be made the basis of a setoff against respondent's liability for the subsequent collection of excess collateral that had not been pledged to secure payment of the assigned account.

Respondent, as such assignee of The Guaranty Company, apppeared voluntarily before the referee in bankruptcy and, on April 2, 1930, filed an application and petition for the reclamation of the aforementioned negotiable securities, alleging that their sale by respondent's assignor was subject to rescission, because the purchase money was not paid in accordance with the terms of sale, and that their delivery to the bankrupt was obtained by fraud. The prayer of the applicant (the respondent here) was:

> "Wherefore your petitioner prays that an order be entered instructing and directing, Herbert S. Daniel, Trustee of said Peters Trust Company, Bankrupt, to deliver to your petitioner the bonds described above and that your petitioner have such other and further relief as may seem just and proper." (R. 1-5).

Your petitioner, the trustee in bankruptcy, on April 3, 1930, filed with the referee in bankruptcy an answer to respondent's petition for reclamation, in which he denied the alleged fraud and denied that the sale of the

securities was conditioned on payment by the bankrupt contemporaneously with the delivery, and alleged their ownership by the bankrupt. The answer also alleged that customers of the bankrupt had previously ordered and paid the bankrupt for certain of said securities, and claimed ownership, and asked that they be made parties and directed to assert their claims, if any, thereto.

The Trustee further alleged in his answer that the Guaranty Trust Company of New York, the applicant in said proceeding, had in its possession, on deposit, approximately the sum of $31,224.60 which belonged to the bankrupt estate, and which was accumulated by the Receiver and Trustee of said bankrupt estate after the date it was adjudicated bankrupt; the trustee had made due demand upon the petitioners (the respondent here) for delivery of the said money, but the Guaranty Trust Company of New York had refused to deliver the said funds or any part thereof, and should be required to account for all funds collected by it on behalf of the receiver or trustee of Peters Trust Company, Bankrupt, or the bankrupt estate, and be directed to deliver the same forthwith to Herbert S. Daniel, Trustee.

The prayer of the answer was in part:

"The Trustee further prays for an order directing the Guaranty Trust Company of New York to account to him for all funds collected or now held by it belonging to the bankrupt estate, and be ordered to deliver the same forthwith to your trustee, and

for such other relief as to the Court may seem just and equitable."

The record shows that on April 5, 1930, the referee made an order requiring the persons named in the trustee's answer, as claimants of certain of said securities, to appear by April 16, 1930, and set forth in writing any interests claimed by them, respectively, in said securities; that the order was served, and five of said persons presented their claims; an order was made by the referee setting the matter for hearing on April 23, 1930, and the hearing was adjourned to April 25, 1930, "at the request of H. M. Baldrige, attorney for the Guaranty Trust Company;" and all parties appeared in person or by attorney, at said last named date, when the matter was heard and determined by the referee (Rec. ~~18-19~~ 19-22).

Before the hearing on the merits was taken up, respondent's counsel moved orally to strike out the paragraphs of petitioner's answer alleging that customers of the bankrupt were claiming certain of the securities in question and that the respondent had collected and received money on behalf of the bankrupt estate since the adjudication of bankruptcy which it should deliver over to respondent as trustee. The referee overruled this motion, and counsel for respondent then dismissed its petition for reclamation, and made the following statement: "The Guaranty Trust Company, by its attorneys, aren't interested in this proceeding. We do not believe we are in court, and we are not interested to stay" (R. 8-10).

Counsel for respondent thereupon withdrew, and the referee proceeded with the hearing on the petitions of interveners, and the answer of the petitioner, as trustee (R. 10-21). The evidence showed that the trustee had received from the respondent after filing his answer the sum of $7,500.00, leaving a balance of $23,724.60 still in respondent's hands. A turnover order against respondent covering said balance of $23,724.60 was entered by the referee, based upon the general finding that the allegations in the trustee's answer were true and the further finding:

> "And the court further finds that the Guaranty Trust Company has in its hand the sum of $23,724.60 in cash belonging to Herbert S. Daniel, trustee of the above named bankrupt; that said sum was accumulated by Herbert S. Daniel, as receiver, subsequent to February 12, 1930, said moneys having been collected by said Guaranty Trust Company for and on behalf of said bankrupt estate from the Prudential Insurance Company of America, on mortgages made by the bankrupt and sold to the Prudential Insurance Company of America, and that said Guaranty Trust Company has not made herein any claim to the said fund of $23,724.60, and is merely holding the said sum of $23,724.60 as custodian and agent of Herbert S. Daniel, as trustee of the above named bankrupt, and that said sum should be delivered forthwith to said trustee" (R. 20).

The order provides in part:

> "And it is further ordered that the Guaranty Trust Company of New York, the applicant herein, be, and it is hereby ordered and directed to forthwith pay over to Herbert S. Daniel, as trustee of the above bankrupt estate, the sum of $23,724.60, of moneys in the hands of said Guaranty Trust Company of New York, belonging to Herbert S. Daniel, trustee of said

bankrupt estate, with interest thereon at the rate of 7 per cent per annum fom this date."

On respondent's petition for review, the District Court affirmed the order of the Referee, except as to the allowance of interest (R. 26). The respondent appealed to the Circuit Court of Appeals, assigning as the sole error that the Referee was without jurisdiction to make the turnover order. The lack of jurisdiction was based on three grounds: First, the order was made after the respondent had dismissed its petition for reclamation; Second, that the money was in the respondent's possession outside the territorial jurisdiction of the Bankruptcy Court; Third, that it was an adverse claimant to the money. No error was alleged as to the facts found by the referee. The decree affirming the referee's turnover order was, on May 4, 1931, reversed by the United States Circuit Court of Appeals for the Eighth Circuit (R. 45-50). *Guaranty Trust Company of New York, vs. Daniel,* 49 Fed. (2d) 866.

SPECIFICATION OF ERRORS RELIED UPON

1. The Circuit Court erred in holding that the referee has no jurisdiction to grant relief on an unrelated matter within the jurisdiction of the Bankruptcy Court against a person who has voluntarily invoked the aid of the bankruptcy court for his own relief.

2. The Circuit Court erred in failing to hold that Equity Rule 30 applies to equitable administrations in bankruptcy pending before the referee so as to permit the trustee in his answer to "set out any setoff or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him * * * so as to enable the court to pronounce a final judgment in the same suit on both the original and the crossclaims".

3. The Circuit Court erred in failing to hold that even if Equity Rule 30, as such, is not binding in proceedings in bankruptcy, nevertheless, to facilitate the speedy, economical, and orderly administration in bankruptcy, the trustee can, by appropriate allegations in his answer, obtain any affirmative relief within the jurisdiction of the bankruptcy court against a petitioner before the court, whether the affirmative relief sought grows out of the same transaction or out of separate and unrelated transactions.

4. The Circuit Court erred in holding that the referee was without jurisdiction to grant the relief sought by the trustee. The respondent sought relief by way of

reclamation of certain securities. The referee could have made the order granting this relief, if the proofs warranted, conditional upon the respondent's turning over the funds of the bankrupt estate in its hands. The respondent failing in its proof or dismissing its petition after the issues were made up could not oust the court of its jurisdiction over the respondent that had already attached.

5. The Circuit Court erred in failing to hold that the litigant cannot, himself, invoke the jurisdiction of the court and the particular form of the proceeding (summary as well as plenary) and then object to the disposition of the issues which the trustee may raise either as a defense to his petition or as a basis of a counterclaim. The consent thus given can not be subsequently withdrawn.

6. The Circuit Court erred in not affirming the order of the District Court, which affirmed the turnover order of the referee.

SUMMARY OF ARGUMENT

I.

Jurisdiction of Subject Matter

1. A referee in bankruptcy has summary jurisdiction to order a person holding property belonging to the bankrupt estate against which he has no adverse claim to deliver the property to the trustee in bankruptcy.

Bankruptcy Act, §23 (U. S. Code, Tit. 11, §49);

Bankruptcy Act, §2 (7) (U. S. Code, Tit. 11, §11);

Bankruptcy Act, §33 (U. S. Code, Tit. 11, §61);

Bankruptcy Act, §38 (4) (U. S. Code, Tit. 11, §66);

Bankruptcy Act, §36 (U. S. Code Tit. 11, §64);

Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405;

Harrison v. Chamberlain, 271 U. S. 191, 70 L. Ed. 897.

2. A mere assertion of an adverse claim does not oust the court of jurisdiction. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the claim is substantial or merely colorable, frivolous, or baseless. If the claim is of the latter class, it may be disregarded and the court may proceed the same as though no adverse claim had been asserted.

Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405.

Gamble v. Daniel, (CCA 8), 39 Fed. (2d) 447.

May v. Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870.

3. A claimant cannot acquire an adverse interest in property belonging to the bankrupt estate that comes into his possession after adjudication in bankruptcy.

May v. Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870, p. 117;

Reed v. Barnett National Bank, (CCA 5) 250 Fed. 983;

Knapp & Spencer Co. v. Drew (CCA 8), 160 Fed. 413;

Eppley v. Baylor, (CCA 8), 293 Fed. 305;

Harrison v. Chamberlain, 271 U. S. 191, 46 S. Ct. 467, 70 L. Ed. 897.

4. The Court has the same summary jurisdiction to order the delivery of money or bank deposits as it has to order the delivery of tangible property, real or personal.

May v. Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870.

Knapp & Spencer Co. v. Drew (CCA 8), 160 Fed. 413.

Reed v. Barnett National Bank (CCA 5), 250 Fed. 983.

In re Davis (D. C. Texas), 119 Fed. 950.

In re Walker Grain Co. (CCA 5), 295 Fed. 120.

In re Radley Steel Const. Co. (D. C., New York) 212 Fed. 462.

5. The Bankruptcy Court has jurisdiction to adjudicate adverse claims on property in its possession.

Bankruptcy Act, §70 (a) (U. S. Code, Tit. 11, §110).

Murphy v. John Hofman Co., 211 U. S. 562, 53 L. Ed. 327.

Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157.

U. S. Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 56 L. Ed. 1055.

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734;

Straton v. Andy New, Jr., 283 U. S. 318.

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 68 L. Ed. 770.

II.

Jurisdiction of the Person

1. The presentation by the trustee of the cross-demand in his answer to the respondent's petition for reclamation, and the power of the Court to determine the issue so presented, are sanctioned by Equity Rule 30 and General Order in Bankruptcy XXXVII.

Bankruptcy Act, §2 (U. S. Code, Tit. 11, §11).

Fidelity Trust Company vs. Gaskell (CCA 8) 195 Fed. 865.

Remington on Bankruptcy, Vol. 1, p. 48, §23.

Bankruptcy Act, §38 (4) (U. S. Code, Tit. 11, § 66).

Bankruptcy Act, §30 (U. S. Code, Tit. 11, §53).

In re Cunney (D. C. Mass.), 225 Fed. 426.

International Harvester Co. v. Carlson, (CCA 8) 217 Fed. 736.

In re Hughes (CCA 2), 262 Fed. 500.

No-Leak-O Piston Ring Co. v. Norris, (CCA 2) 277 Fed. 951.

Buffalo Specialty Company v. Vancleef, 217 Fed. 91, (D. C. Ill.).

Champion Spark Plug Co. v. Champion Ignition Co., 247 Fed. 200 (D. C. Mich.)

Marconi Wireless Telegraph Co. v. National Electric Signaling Co., 206 Fed. 295.

Electric Boat Co. v. Lake Torpedo Boat Co., 215 Fed. 377.

Goodno v. Hotchkiss, 230 Fed. 514.

Harper Bros. v. Klaw, 232 Fed. 609.

Dykes v. Widdows, (CCA 8), 31 (2d) 745.

Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 43 S. Ct. 149, 67 L. Ed. 309.

2. If petitioner has misconceived the purpose and effect of the General Order and the Equity Rules are only "to be looked to for analogies" in the case at bar, there is still ample reason for approving the procedure followed by the referee. Public policy requires that bankrupt estates be speedily administered without unnecessary litigation. Both parties were before the Court and the procedure adopted adjudicated all the controversies between them.

Murphy v. Hofman Co., 211 U. S. 562, 53 L. Ed. 327;

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734;

White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183;

Dayton v. Stanard, 241 U. S. 588, 60 L. Ed. 1190.

3. The appellant, by coming into the Bankruptcy Court and seeking affirmative summary relief, thereby gave the Court jurisdiction of its person, as to such is-

sue, and all such defenses, including affirmative claims that may be properly litigated in that summary proceedings. Consent thus given cannot be withdrawn so as to deprive the Court of jurisdiction so obtained.

Operative Piano Co. v. First Wisconsin Trust Co., (CCA 7) 283 Fed. 904.

In re Bennett (CCA 7) 285 Fed. 351.

In re Pennsylvania Coffee Co., (D. C.) 8 Fed (2d) 98.

Triangle Electric Co. v. Foutch (CCA 8) 40 Fed. (2d) 353.

In re Dernburg & Son, Inc., (CCA 2), 5 Fed. (2d) 37.

In re Barnett (CCA 7) 12 Fed. (2d) 73.

Wiswall v. Campbell, 93 U. S. 347, 23 L. Ed. 923.

4. Equitable terms may be imposed by a Court as a condition of granting an order of reclamation.

In re Hooven-Owens-Rentschler Co., (CCA 6), 195 Fed. 424.

Remington on Bankruptcy, Vol. 5, p. 602, §2455.

5. Respondent's withdrawal after the issues had been made up and the hearing entered upon did not defeat the jurisdiction, previously attached, to determine the issue raised by the answer of the trustee.

Vidal v. South American Securities Company (CCA 2), 276 Fed. 855.

Buffalo Specialty Company vs. Vancleef, (D. C.) 217 Fed. 91.

6. The speedy administration of the Bankruptcy Law requires the application of the modern equity prac-

tice which permits the adjudication of all controversies between the same parties in one suit.

Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405;
May v. Henderson, 268 U. S. 111, 69 L. Ed. 870;
Harrison v. Chamberlain, 271 U. S. 191, 70 L. Ed. 897.

7. The final decision of the Court is not a test of jurisdiction.

In re Small Shoe Co. (CCA 2) 5 Fed. (2d) 956.

8. Courts of Bankruptcy in exercise of their equity powers act in personam and have summary jurisdiction where a party voluntarily appears or can be served with process, regardless of the location of the res or domicile of the party.

Robertson v. Howard, 229 U. S. 254, 57 L. Ed. 1174.

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734.

Alco Film Corp. v. Alco Film Service (CCA 2), 234 Fed. 55.

Orinoco Iron Co. v. Metzel (CCA 6), 230 Fed. 40.

In re Britannia Mining Co. (D. C. Wis.), 197 Fed. 459.

In re Small Shoe Co., (CCA 2) 5 Fed. (2d) 956.
Staunton v. Wooden (CCA 9) 179 Fed. 61.

III.

Ancillary Jurisdiction Does Not Bar the Court of Primary Jurisdiction from Acting if the Non-Resident Party Voluntarily Appears Before It.

Babbitt v. Dutcher, 216 U. S. 102, 54 L. Ed. 402.
Elkus, Petitioner, 216 U. S. 115, 54 L. Ed. 407.

Robertson v. Howard, 229 U. S. 254, 57 L. Ed. 1174.

Bankruptcy Act, §2 (20) (U. S. Code, Tit. 11, §11).

Shortridge v. Utah Savings & Trust Co., (CCA 10) 40 Fed. (2d) 328.

IV.

WEIDHORN V. LEVY, 253 U. S. 268, 64 L. Ed. 898, Is Not Applicable to the Issues Raised in this Case.

V.

The Merits of the Case.

1. The case was correctly decided by the Referee.

2. As a matter of law, no setoff could exist. A debtor cannot acquire claims after insolvency and in contemplation of bankruptcy and use them as a setoff. Neither can the liens be obtained on the bankrupt's property acquired after bankruptcy.

Bankruptcy Act, §68 (U. S. Code, Tit. 11, §108).

Collier on Bankruptcy, 13 Ed., Vol. 2, p. 1618;

Remington on Bankruptcy, Vol. 4, p. 182 §§1465, 1466.

In re Shults, (D. C.) 135 Fed. 623.

VI.

Answer to Respondent's Theory.

General Phonograph Corp. v. Fanning (CCA 3), 6 Fed. (2d) 115.

In re Hooven-Owens-Rentschler Co. (CCA 6) 195 Fed. 424.

ARGUMENT.

But for the change in the procedure for review in bankruptcy matters, this case would have come before the circuit court on a petition to revise. *In re Wood*, (CCA 2), 278 Fed. 355. On a petition to revise, the appellate court will not examine the evidence, except to see that there is some evidence to support the findings of the lower Court. *Shea vs. Lewis* (CCA 8), 206 Fed. 877. The abolishment of the petition to revise does not impose upon the appellate court the duty to try every appeal *de novo;* on the contrary, the same rules are applied as existed before the change in the law. It is, therefore, unnecessary to enter upon a detailed consideration of the evidence. This is, also, true for the reason that the respondent in its petition for review to the district court (R. 22) and, in its assignment of errors on its appeal to the circuit court, made no contention that the findings of the referee are not supported by the record (R. ~~30-32~~ 31-34). We, therefore, must start with the proposition that the findings of fact of the referee are conclusively established and confine our examination to the sole question of whether or not on the established facts the referee had jurisdiction to enter the turnover order in question.

The important facts to be noted are:

1. The respondent entered its general appearance in the bankruptcy court by filing its petition for reclamation with the referee.

2. The trustee in his answer, by appropriate allegations by way of counterclaim in the nature of a cross-bill, sought the affirmative relief granted by the referee.

3. The respondent had in its possession $23,724.60 that it had collected after the adjudication in bankruptcy for the petitioner.

4. The respondent made no adverse claim and, on the evidence, it was found to have no adverse claim to any part of said money but was holding it as custodian or agent for the petitioner.

From these facts, it is asserted that the referee in bankruptcy had jurisdiction to enter the turnover order here in question.

The question of jurisdiction can properly be divided and considered under two headings: *first,* jurisdiction of the subject matter, and; *second,* jurisdiction of the person.

I.

JURISDICTION OF THE SUBJECT MATTER.

1.

A referee in bankruptcy has summary jurisdiction to order a person holding property belonging to the bankrupt estate against which he has no adverse claim to deliver the property to the trustee in bankruptcy.

This case is not a controversy between a trustee and an adverse claimant concerning property claimed by the trustee, which, unless by consent of the claimant, must be determined in a plenary suit in a court in which the bankrupt might have brought the suit if bankruptcy had not intervened. The jurisdiction is not, therefore, governed by Section 23 of the Bankruptcy Act. (U. S. Code, Tit. 11 §49) relating to plenary suits by trustees against adverse claimants.

Section 2 (7) of the Bankruptcy Act, (U. S. Code, Tit. 11, §11) invests courts of bankruptcy with jurisdiction at law and in equity to "cause the estates of bankrupts to be collected, reduced to money and distributed, *and determine controversies in relation thereto, except as herein provided.*"

Section 33 (U. S. Code, Tit. 11 §61) creates the office of Referee; and Section 38 (4) (U. S. Code, Tit. 11 §66) invests the referee with jurisdiction to: "perform such part of the duties, except as to questions arising out of the applications of the bankrupt for composition or discharge, *as are by this act conferred on courts of bankruptcy of their respective districts,* except as herein otherwise provided."

GENERAL ORDER XII provides that after the order of reference reaches the referee "all proceedings, except such as are required by the Act or by these General Orders to be had before the judge shall be had before the referee." Section 36 (U. S. Code, Tit. 11, §64) also prescribes the same oath for referees as were prescribed by judges of the United States courts.

This Court has determined that issues of the class now under consideration do not come under any of the exceptions of the bankruptcy act of questions reserved from the general powers conferred upon referees, and that the referee has power to act in the first instance on such matters and make a summary turnover order. *Mueller v. Nugent,* 184 U. S. 1-18; *Harrison v. Chamberlain,* 271 U. S. 191-195.

In the case of *Mueller v. Nugent,* supra, this Court said "We think the referee has the power to act in the first instance in matters such as this when the case has been referred and in aid of the courts of bankruptcy, an exercise in such cases 'much of the judicial authority of that court' ".

2.

A mere assertion of an adverse claim does not oust the court of jurisdiction. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the claim is substantial or merely colorable, frivolous, or baseless. If the claim is of the latter class, it may be disregarded and the court may proceed the same as though no adverse claim had been asserted.

It is thus evident that the test of jurisdiction is whether or not the person in possession has an *actual* adverse claim that he is asserting against the property. One of the leading cases on this point in the case of *Mueller vs. Nugent,* 184 U. S. 1. Chief Justice Fuller, speaking for the Court, said in part:

> "The proposition was that, as matter of law, where property of a bankrupt has come into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim, the bankruptcy court has no power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed.
>
> "In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt or his agent to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? Does a mere refusal by the bankrupt

or his agent so to deliver up oblige the trustee to resort to a plenary suit in the circuit court or a state court, as the case may be?

"If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired and in many respects rendered practically inefficient.

"The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law."

In *Gamble vs. Daniel,* (CCA 8), 39 Fed. (2d) 447, on p. 453, the court said:

"If such claim is only colorable or the property is so held for account of the bankrupt, the bankruptcy court has jurisdiction, summarily to 'direct an accounting and a payment over to the trustee or receiver appointed by the bankruptcy court.' *May vs. Henderson,* 268 U. S. 111, 115, 45 S. Ct. 456, 458; 69 L. Ed. 870."

This proposition is so thoroughly established, a lengthy citation of authorities is not required.

It is also equally well established that the bankruptcy court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the claim is substantial and adverse or merely colorable, frivolous, or baseless. This Court, in the case of *Mueller vs. Nugent,* 184 U. S. 1, 22 S. Ct. 269, 46 L. Ed. 405, on this point, said in part:

"But suppose that respondent had asserted that he had the right of possession by reason of a claim adverse to the bankrupt, the bankruptcy court had the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction, while its conclusion might have been that an adverse claim, not merely colorable, but real even though fraudulent and voidable, existed in fact, and so that it must decline to finally adjudicate on the merits. If it erred in its ruling either way, its action would be subject to review."

In the case of *May vs. Henderson*, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870, Mr. Justice Stone, speaking for the court, said in part:

"Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of an adverse claim. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the principles of decision here stated. Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 22 Sup Ct. Rep. 269; Schweer v. Brown. 64 CCA 574, 130 Fed. 328, 195 U. S. 171, 49 L. Ed. 144, 25 Sup. Ct. Rep. 15; Herbert v. Crawford, 228 U. S. 204, 57 L. Ed. 800, 33 Sup Ct. Rep. 484; Re Ellis Bros. Printing Co., 156 Fed. 430. It may disregard the assertion that the claim is adverse if, on the undisputed facts, it appears to be merely colorable. Re Weinger, B. & Co., 126 Fed. 875; Re Rudnick & Co., 158 Fed. 223; Re Ransford, 115 CCA 560, 194 Fed. 658; Re Michaelis, 196 Fed. 718."

The adverse claim must be asserted to oust the court of jurisdiction; whether an adverse claim is being as-

serted must be determined from the pleadings. The court in *Gamble vs. Daniel,* (CCA 8), 39 Fed. (2d) 447, on page 453 said:

> "From the above authorities, it is clear that the bankruptcy court had jurisdiction to determine that this property was or was not 'adversely' held by the appellant; that such determination must rest upon the allegations of the claimant; and that, if such allegations be insufficient, a summary order of delivery might be made. The question is whether the allegations here are sufficient."

The respondent filed no reply to trustee's answer and nowhere in the pleadings is there the slightest suggestion that it claimed an adverse interest in said moneys. The respondent offered no evidence at the hearing of the referee. The Circuit Court concluded (R. 47): "Under these findings, there is no basis for any claim that the appellant was an adverse claimant, both because no such claim was asserted, and because the referee found that the money in question was the bankrupt's and had been received after bankruptcy proceedings had begun."

3.

A claimant cannot acquire an adverse interest in property belonging to the bankrupt estate that comes into his possession after adjudication in bankruptcy.

Even if the respondent had asserted an adverse claim, it is apparent that such assertion would be colorable merely since the funds in question were collected by the respondent long after the adjudication in bankruptcy. It is fundamental that no adverse claim can be made to funds received by the claimant after adjudication in bankruptcy. This Court, in the case of *May vs. Hender-*

son, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870, on p. 117 said in part:

> "In consequence, any person acquiring an interest in property of the bankrupt or his assignees for the benefit of creditors, adverse to the creditors, after the filing of a petition, with notice of it, may be directed to surrender the property thus acquired by summary order of the bankruptcy court. Re Denson, 195 Fed. 854; Re Rudnick, 158 Fed. 223; and see White v. Schloerb, supra.
>
> "The rule is the same when a creditor secures payment of his debt from the bankrupt's estate after the filing of the petition. A summary order may be made, directing repayment of the money to the trustee in bankruptcy. Knapp & S. Co. v. Drew, 87 CCA 365, 160 Fed. 413; Re Leigh, 208 Fed. 486; Re R. & W. Skirt Co., 138 CCA 67, 222 Fed. 256; Re Columbia Shoe Co., 289 Fed. 465. A like rule has been applied where a bank secures payment of its debt by setting up its lien or right of counterclaim against a deposit account of the bankrupt or the bankrupt's assignee, created subsequent to the filing of the petition. Re Michaelis, 196 Fed. 718; Reed v. Barnett Nat. Bank, 163 CCA 233, 250 Fed. 983. See Farmers & M. Nat. Bank v. Wilkinson, 266 U. S. 503, ante, 408, 45 Sup. Ct. Rep. 144. Any other rule would leave the bankruptcy court powerless to deal in an effective way with those holding property for the bankrupt, who, pending the bankruptcy proceedings, wilfully dispose of it by placing it beyond the reach of the court. Bryan v. Bernheimer, 181 U. S. 188, 196, 45 L. Ed. 814, 819, 21 Sup. Ct. Rep. 557."

The facts of the case of *May vs. Henderson* are briefly: The bankrupt, within four months of adjudication, made a general assignment for the benefit of creditors. At the date of the assignment, the bankrupt was indebted to the bank. The assignee, who was the president of the

bank, opened a bank account and deposited the funds so collected therein. Some of these deposits were made before and some after the adjudication in bankruptcy and the bank sought to hold the same as a setoff on its note. On an order to show cause and a summary hearing, the bank was directed to deliver the said funds to the trustee of the bankrupt disregarding the adverse claim of the bank, based on its assertion of the right of setoff. This Court upheld the action of the lower court, thus affirming the jurisdiction of the bankruptcy court to summarily order the delivery of money and bank accounts to the trustee in bankruptcy when there was no actual adverse claim against the said fund and also held that no real adverse claim could exist against such funds.

In the case of *Reed vs. Barnett National Bank,* (CCA 5), 250 Fed. 983, the court announced the rule in the syllabus as follows:

> "A bank cannot acquire the right to setoff against an indebtedness to it money deposited by a bankrupt after the filing of the petition against him, so as to require a plenary suit by the trustee for its recovery, but may proceed by petition for a summary order in the bankruptcy proceedings."

The opinion of the court is, in part, as follows:

> "This being so, the $2,703.98 balance represents funds of the bankrupt received by the bank after the petition in bankruptcy was filed. The case presented is that of a creditor getting possession of funds of the bankrupt after the petition against him was filed, and setting up a claim of right to apply such sum to the bankrupt's debt to it. Before the bankrupt deposited these funds in the bank, the petition in bankruptcy had already become operative as 'a caveat

to all the world and in effect an attachment and injunction.' Before the bank acquired possession, the funds were already in the custody of the law. They were not subject to be withdrawn from the bankruptcy court's grasp by another acquiring actual possession of them from the bankrupt.

"* * * There was no color of right in the bank to retain funds received and kept under such circumstances The bank was incapable of acquiring an adverse claim upon funds received from the bankrupt after the petition against him was filed. The claim could not be regarded as an adverse one, existing when the petition in bankruptcy was filed, as the subject of it was in the bankrupt's possession thereafter, and the bank's claim was one that could not be made until it acquired possession.

"The trustee seeks an order requiring the delivery to him of assets of the bankrupt which were in the latter's possession subject to no lien, after the petition in bankruptcy was filed. A plenary suit is not necessary in such a case. The delivery to the trustee of the bankrupt's property so acquired and held after the court's control of it attached may be ordered in a summary proceedings." Citing cases.

The Eighth Circuit has several times recognized the correctness of this proposition. In *Knapp & Spencer Co. vs. Drew,* (CCA 8), 160 Fed. 413, the facts are briefly that after the filing of an involuntary petition, a receiver was appointed, but the receiver failed to qualify and, on application of the bankrupt, was dismissed and the money in his hands returned to the bankrupt. The bankrupt then negotiated a settlement with certain of his creditors on a basis of 40% of their demands, but the bankruptcy proceedings had not been dismissed and later an adjudication in bankruptcy was entered. The trustee then

brought this summary proceeding before the referee to require the creditors, who had received this money, to deliver the same to him. The court, on p. 415, said in part:

> "Appellant first contends that it was an adverse claimant of the money in question and could not be proceeded against summarily by motion, but was entitled to defend itself and justify its adverse claim in a plenary suit instituted by the trustee for the recovery of the money. This position, we think is totally untenable."

In *Eppley vs. Baylor*, (CCA 8), 293 Fed. 305, a state court receiver had been appointed for the hotel properties belonging to the bankrupt. Later an involuntary petition in bankruptcy was filed. No adjudication was entered for a period of nearly two years after the filing of the petition. In the interim between the filing of the petition and the adjudication in bankruptcy, the state court receiver sold and conveyed the hotel in question to Mr. Eppley and the sale was duly confirmed by the state court. After the appointment of the trustee in bankruptcy, the trustee brought this summary proceedings before the referee to require the turnover of the property to him. Eppley set up an adverse possessory right and asserted that the court was without summary jurisdiction and the matter of his right could only be determined in a plenary suit. The referee entered the summary turnover order, which was affirmed on appeal. The concluding paragraph of the opinion is:

> "Our conclusion is, that petitioner's adverse possessory claim is a fallacious conception of his rights and wholly without merit."

On p. 308, the court said in part:

> "It further appears from his return that the Hotel Company was adjudged a bankrupt on that petition on Nov. 14, 1922. So that Eppley, when he made his contract, took possession of the properties, made payments on the purchase price and made the other expenditures for which he claims an equitable lien and the right to remain in possession until that lien is discharged, knew that the properties were then in the custody of the law and that the bankrutpcy court had jurisdiction over them and the bankrupt, and that he could not obtain an adverse right to or interest in them while that proceeding was pending without the consent and under and pursuant to the orders of that court. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 301, 32 Sup. Ct. 96, 56 L. Ed. 208; Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568; 57 L. Ed. 927, 46 L. R. A. (N. S.) 154; Lazarus v. Prentice, 234 U. S. 263, 34 Sup. Ct. 851, 58 L. Ed. 1305; In re Sage, 236 Fed. 644, 194 CCA 640; In re Diamond's Estate, 259 Fed. 70, 170 CCA 138; Bailey v. Baker Ice Machine Co., 239 U. S. 269, 36 Sup. Ct. 50, 60 L. Ed. 275. His conduct was an interference with the jurisdiction of that court and its right and duty to effectively proceed in that cause."

From these and other authorities, the conclusion is inevitable that any claim the respondent might have asserted to the funds in question would be "without any legal justification" and, therefore colorable only and would not oust the referee of summary jurisdiction. *May vs. Henderson,* 269 U. S. 119, 45 S. Ct. 456, 69 L. Ed. 875; *Harrison vs. Chamberlain,* 271 U. S. 191, 46 S. Ct. 467, 70 L. Ed. 897.

4.

The Court has the same summary jurisdiction to order the delivery of money or bank deposits as it has to order the delivery of tangible property, real or personal.

The respondent in the hearing below suggested that the law applicable to the turning over of tangible property would not apply to bank accounts and money.

It was suggested that a bank deposit is a mere debtor and creditor relation so only a plenary suit for money judgment would lie. Such a suggestion is without merit, as shown by numerous holdings of the courts. We have already referred to the case of *May vs. Henderson,* 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870. The Court therein stated "a summary order may be made directing repayment of money to the trustee in bankruptcy." The court also held in that case that a summary accounting could be ordered. The Court said "the duty of a fiduciary to account for property entrusted to his care is fulfilled by delivery of the property; but if he has put it out of his power to deliver it, he may nevertheless be compelled to account for its worth * * *. He is subject to the summary order of the bankruptcy court to restore the property to the bankrupt's estate. If he has sold it or mingled it with his own, he may be compelled by summary order to restore the value of the property thus wrongfully diverted."

In the case of *Knapp & Spencer Co. vs. Drew* (CCA 8), 160 Fed. 412, the court upheld the summary order of the referee to repay money collected from the bankrupt after the filing of the petition in bankruptcy. There is no contention that the appellant in that case had kept the

money in specie separate and apart from his own funds.

In the case of *Reed vs. Barnett National Bank* (C. CA 5), 250 Fed. 983, the summary jurisdiction over a bank account which the bank had appropriated and applied on its note was upheld.

In re *Davis* (D. C., Texas), 119 Fed. 950, the court summarily ordered a bank to restore the bankrupt's deposit which the bank had appropriated on its own indebtedness and deliver the same to the trustee in bankruptcy.

In re *Walker Grain Co.*, (CCA 5), 295 Fed. 120, the rule is stated in paragraph 2 of the syllabus as follows:

> "A creditor which received payment from a bankrupt after the filing of a petition against it with knowledge of such a petition is without color of right to retain the money and may be required to pay it to the trustee by summary order of the bankruptcy court."

In re *Radley Steel Const. Co.* (D. C., New York), 212 Fed. 462, the rule is stated in paragraph 2 of the syllabus as follows:

> "The right to draw checks against an account in a bank distinguishes the position of the bank from that of an ordinary debtor and gives the bankruptcy court the right to order payment to the trustee of such deposits as are not claimed by the bank on some other ground than its holding as a depository."

The collection and mingling of funds of the bankrupt after adjudication is therefore no bar to the summary jurisdiction of the court.

From a review of the above authorities, the conclusion must inevitably be reached that the referee had jurisdiction of the subject matter of the turn-over order. If the respondent was in the territorial jurisdiction of the referee so that service of process could have been had upon it, or if it submitted itself to the jurisdiction of the court, it must be held that the referee was acting within his authority. This was the view taken by the referee and the District Court and the correctness thereof is apparently conceded by the opinion of the Circuit Court (R. 47-48).

5.

The Bankruptcy Court has jurisdiction to adjudicate adverse claims on property in its possession.

It might be argued with some force that the Bankruptcy Court had constructive possession of the funds in question, the respondent being a mere agent of the trustee for the purpose of collection.

Section 70 (a) of the Bankruptcy Act (U. S. Code Tit. 11 §110) vests in the trustee the property and rights, real and personal belonging to the bankrupt, as of the date he was adjudged a bankrupt. The money affected by the referee's order in the present case was, by operation of the statute, placed in the constructive possession of the Bankruptcy Court from the date of its receipt by respondent. The excess collateral mortgages from which the money was derived were in constructive possession of the court from the date of the adjudication in bankruptcy. It is well settled that if the Bankruptcy Court has possession, either actual or constructive, it has sum-

mary jurisdiction, to consider all questions of liens or claims against said property.

In the case of *Murphy v. John Hofman Co.*, 211 U. S. 562, 53 L. Ed. 327, Mr. Justice Moody, speaking for the Court said:

> "But where the property in dispute is in actual possession of the Court of Bankruptcy; there comes into place another principle, not peculiar to courts of bankruptcy, but applicable to all courts, federal or state. Where a court of competent jurisdiction has taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them."

Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, Mr. Justice Day, writing the opinion, said:

> "• • • on adjudication, title to the bankrupt's estate becomes vested in the trustee with actual or constructive possession and placed the custody in the bankruptcy court.
>
> "We think the result of these cases is, in view of the broad powers conferred in §2 of the bankrupt act, authorising the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money, and distributed, and to determine contro-

versies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same, and the extent and character of liens thereon or rights therein."

Taubel-Scott Kitzmiller Co. vs. Fox, 264 U. S. 426, 68 L. Ed. 770, Mr. Justice Brandeis, speaking for the Court, said in part:

"By the Act of 1898, as originally enacted, the power of the bankruptcy court to adjudicate, without consent, controversies concerning the title, arising under either §67e, or §60b, or §70e, was confined to property of which it had possession. The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee, where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from his custody; where the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person, who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only. As every court must have power to determine, in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession, actual or constructive. It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court."

U. S. Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 56 L. Ed. 1055;

Isaacs vs. Hobbs Tie & Timber Co., 282 U. S. 734;

Straton v. Andy New, Jr., 283 U. S. 318.

Therefore, it could be held that since the court had at least constructive possession of the property in question, it could adjudicate the adverse claims of all parties and the necessary parties could be brought in by notice served on them wherever they might be. Such a holding would render a discussion of many of the points taken up in this brief unnecessary.

II.

JURISDICTION OF THE PERSON.

1.

The presentation by the trustee of the cross-demand in his answer to the respondent's petition for reclamation, and the power of the court to determine the issue so presented, are sanctioned by Equity Rule 30 and General Order in Bankruptcy XXXVII.

Section 2 of the Bankruptcy Act (U. S. Code Tit. 11 §11) provides that courts of bankruptcy:

> "are hereby invested within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law *and in equity* as will enable them to exercise *original jurisdiction in bankruptcy proceedings*, in vacation in chambers, and during their respective terms as they are now or may be hereafter held, to * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, *and determine controversies in relation thereto*, except as herein otherwise provided."

Subject to certain specific exceptions that are not involved in the instant case, original equity jurisdiction "to determine controversies in relation" to collection, reduction to money, and distribution of the estates of bankrupts, is thus expressly conferred upon courts of bankruptcy.

As stated in *Fidelity Trust Company v. Gaskell*, (CCA 8), 195 Fed. 865, at 871:

> "A proceeding in bankruptcy is a proceeding in equity and a district court sitting in bankruptcy, whether in exercising its primary or ancillary jurisdiction, is a court of equity."

The rule is stated in Remington on Bankruptcy, Vol. I, page 48, Sec. 23, as follows:

> "Bankruptcy proceedings are a branch of equity jurisprudence.
>
> "And the rules of equity control rather than those of law; and this is so although certain issues may be triable to a jury by the statute, such jury being the jury to which the chancellor always has the power to refer questions of fact for their advice. • • •
>
> "The bankruptcy court has the incidental power to grant any equitable relief which may be necessary in the administration and distribution of the estate."

Section 38 (4) (U. S. Code Tit. 11 §66) quoted in division 1 of this argument (ante, p. 21) confers upon referees, subject to exceptions not here involved, jurisdiction to perform such part of the duties as are conferred on courts of bankruptcy of their respective districts.

Section 30 (U. S. Code Tit. 11 §53) refers to the Supreme Court of the United States the duty of prescribing

rules, forms and orders as to procedure for carrying the act into force and effect.

This court by No. XXXVII of the General Orders in Bankruptcy, adopted in conformity to said §30, prescribed the following rule of practice:

> "In the proceedings in equity instituted for the purpose of carrying into effect the provisions of the act, *or for enforcing the rights and remedies given by it,* the rules of equity practice established by the Supreme Court of the United States shall be followed, as nearly as may be * * *."

Obviously, except as the privilege of modification is granted to facilitate speedy hearings, the rules of equity practice are applicable, without limitation or reservation, to all equitable proceedings in courts of bankruptcy. Some of the inferior federal courts have disregarded the rules of equity practice in equitable proceedings in bankruptcy, or have asserted that their application is limited and not authoritative. But the order quoted makes it mandatory for courts of bankruptcy to follow the equity rules in all proceedings in equity, as nearly as may be.

Some of the inferior Federal Courts have failed to recognize the broad scope of Order XXXVII and to apply the rules of equity practice in equitable proceedings in Courts of Bankruptcy. We cite here a few illustrative cases.

In *re Cunney* (D. C. Mass.) 225 Fed. 428, the court said:

> "General Order No. XXXVII, applies only to equity proceedings, *properly so called;* and not to summary proceedings in bankruptcy like this" (objections to the discharge of the bankrupt).

In *International Harvester Co. v. Carlson* (CCA 8), 217 Fed. 739, it was said:

> "We do not think that general equity rules can be applied as rules of court in the performance of the administrative work of courts of bankruptcy. They may be looked to for analogies, but not as rules. The Supreme Court, itself, has fixed the rules to govern courts of bankruptcy."

In *re Hughes* (CCA 2) 262 Fed. 501, it is said:

> "We approve of the decision in *International Harvester Co. v. Carlson*, 217 Fed. 736, 133 CCA 430, and hold that the equity rules of the Supreme Court are not rules of court, affecting the administrative work of bankruptcy."

In *No-Leak-O Piston Ring Co. v. Norris*, (CCA 2) 277 Fed. 951, it is said:

> "The equity rules are of limited application in bankruptcy (*In re Hughes*, CCA 262 Fed. 500), yet they furnish a guide to procedure, and this was just as true before the promulgation of the present equity rules as it is now."

In view of some of the holdings of the inferior federal courts, Mr. Remington in his work on Bankruptcy states:

> "This general order (No. XXXVII) has been construed to refer only to suits and proceedings other than the proceedings in bankruptcy themselves, in other words, to suits and proceedings brought in the federal courts in aid of bankruptcy proceedings." (1 Remington Bankruptcy, 3rd Ed. §31.)

Petitioner maintains that general order XXXVII does not admit of such an interpretation. To hold that

this order applies only to plenary suits in equity brought in district courts, as distinguished from summary bankruptcy proceedings, would render the order itself wholly inoperative; because the equity rules by their own inherent force govern the practice in all such plenary suits. The order adopting the equity rules would be purposeless, if so construed, since the existing equity rules apply to all equity proceedings that invoke the general equity powers of the District Courts.

The general and comprehensive terms of the order in question leave no room for the process of interpretation. The order contains no words of limitation that restrict its operation to plenary or ancillary suits invoking the general equity powers of the District Courts. The terms employed may imply a limitation of the order to proceedings *in courts of bankruptcy*. It was only in such proceedings that there was any occasion for the order. It was only "for carrying this act into force and effect" that §30 of the bankruptcy act placed upon this court the duty of prescribing "all necessary rules, forms and orders as to procedure."

There is no departure from this object upon the face of the order requiring conformity to the equity rules. To the contrary, the order employs apt terms to cover the object expressed in §30 of the bankruptcy act. It makes the equity rules of practice apply to proceedings "instituted for the purpose of carrying into effect the *provisions of this act, or for enforcing the rights and remedies given by it.*" Action upon petitions in bankruptcy, voluntary and involuntary, and the various proceedings incident thereto, must be had in the courts of bankruptcy;

and when of an equitable nature, as are most of such proceedings, the General Order XXXVII prescribes the equity rules of practice.

It is submitted that in this case the referee and the district judge properly applied equity rule 30 by refusing to strike and by determining the cross-demand presented by the answer of the trustee; and that this court cannot, with due regard to its high power and dignity, sanction the misreading or false interpretation of General Order XXXVII indulged by the Circuit Court of Appeals in this case.

Equity Rule 30 provides in part:

> "The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit and *may*, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him and such set-off or counter-claim, so set up, shall have the same effect as a cross-bill, so as to enable the court to pronounce a final judgment in the same suit on both the original and the cross-claims."

It will be noted from this rule that the defendant is required to set up any counter-claim that he may have, if it arises out of the same transaction, or otherwise the claim will be barred, and it gives him the option at his election of also setting up any counter-claim not arising out of the said transaction upon which he could have brought an independent suit in equity. The purpose of the rule seems to be not only to simplify the form of pleading, but also to allow all the equities between the parties litigated and disposed of in the one action. The

revised rule follows in the main the English rule to the same effect, in which all equitable claims existing between the parties, were allowed to be tried in the one action.

The above construction seems to be the construction given by the majority of the courts, although there are some courts that hold that the revised rule does not allow any action to be pleaded as a counter-claim that could not have been made the subject of a cross-bill prior to the adoption of this rule.

In the case of *Buffalo Specialty Company vs. Vancleef*, 217 Fed. 91, D. C. of Illinois, decision by Judge Sanborn, the purpose and effect of Rule No. 30 was ably stated. The court said in part, on page 93:

> "The language is perfectly clear. If defendant has an independent cause of action in equity against plaintiff, he may counter-claim it. If any corroboration of this view were needed, it is found in the fact that the Supreme Court in adopting the rule omitted the last clause of the English rule which restricts counter-claims to those that can be conveniently disposed of and those which ought to be allowed. Not only was any set-off or counter-claim, which may be the subject of an independent suit, included, but an exception was rejected. Moreover, it has always been held by the English courts that independent causes of action wholly unconnected with the claim of the plaintiff may be counter-claimed * * *. Nor is a counter-claim to be excluded because the plaintiff is a foreigner who could not be sued in England. By invoking the jurisdiction, he consents to be sued there by counter-claim, unless plaintiff be a sovereign not suable without its consent * * *. By adopting the English rule, its construction in England is adopted, at least, to the extent of excluding construction at variance with the plain and explicit

language under such circumstances. The clear meaning of the words should not be rejected on account of supposed inconvenience in applying the rule."

Champion Spark Plug Co. vs. Champion Ignition Co., 247 Fed. 200, D. C. Michigan. The third paragraph of the syllabus is as follows:

"A complainant, who brings a suit in equity in a federal court in a district of which he is not an inhabitant, and in which he has no established place of business, is required to meet in such suit any counter-claim which the defendant may set up under equity rule 30, whether it arises out of the transaction which is the subject-matter of the suit, or is one which might be the subject of an independent suit in equity against him."

In the opinion the court said in part as follows:

"I think, also, that even if this counterclaim did not arise out of such transaction, but might, under the rule, have been the subject of an independent suit in equity against the plaintiff, the same result would have followed, and the court would have had jurisdiction to consider it in this suit. The obvious purpose of the new equity rules is the simplification of procedure and the elimination of unnecessary and inequitable technicalities. It would seem that there could be no valid reason why a plaintiff, who has voluntarily gone into a district outside that in which he is an inhabitant and begun a suit, should not be required to meet any claim in equity which the defendant in such suit may have against him. There is nothing in the language of the rule which restricts the right of a defendant in filing a counterclaim to any particular district. The language used is quite plain, and clearly authorizes such defendant to 'set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit

in equity against him.' The subject-matter of the present counterclaim certainly might have been the subject of such independent suit. If, therefore, the plaintiff must be held to have known that the defendant was compelled, and therefore permitted, to litigate the subject-matter of such suit, and that consequently by filing its bill in this district it waived its right to object to the jurisdiction of this court over such counterclaim, why should it not also be held that, in view of the right granted by this rule to a defendant to set out any set-off or counterclaim which might be the subject of an independent suit in equity against the plaintiff, the plaintiff must have known that such right existed, that such set-off or counterclaim might be presented against it if it filed its bill, and that, therefore, by filing such bill in this district, it waived its privilege of objecting to such jurisdiction. It seems to me that plaintiff, having selected this court as the forum of a suit against the defendants must, in view of this rule, be considered to have known that it was submitting to this court in this suit any dispute or issues between it and the defendants cognizable in a federal court of equity, and that it should not now be permitted to split up such disputes and issues and withdraw a part thereof from this court and claim the benefit of its own demands while denying to defendants the right to try out all of the equitable controversies between these parties. It is clear that it was the purpose of this rule to give to defendants this very right. * * * If this language means anything, it means that in such answer a defendant may set out any counterclaim which might be the subject of an independent suit in equity and that the subject matter of such counterclaim is not limited to matters which might, under the old practice, be the subject of a cross-bill.''

The court then cites in support of this construction, the following cases: *Marconi Wireless Telegraph Co. vs.*

National Electric Signaling Co., 206 Fed. 295; *Electric Boat Co. vs. Lake Torpedo Boat Co.*, 215 Fed. 3077; *Goodno vs. Hotchkiss*, 230 Fed. 514; *Harper Bros. vs. Klaw*, 232 Fed. 609.

The Eighth Circuit apparently recognized the same rule in the case of *Dykes vs. Widdows* (CCA 8) 31 Fed. 2d, 747, the court said:

> "But Equity Rule 30 affords a protection against that result in providing an answer may contain, without crossbill, a set-off or counterclaim which might be the subject of an independent suit in Equity, 'so as to enable the court to pronounce a final judgment in the same suit.'"

Whatever conflict there may have been between the lower Courts, the construction of Equity Rule 30 has been definitely fixed by the opinion of this Court in the case of *Champlain Realty Co. v. Brattleboro*, 260 U. S. 360, 43 S. Ct. 149, 67 L. Ed. 306. The Court, speaking through Chief Justice Taft, said:

> "The counter-claim and the set-off and counter-claim in the two clauses are in pari materia, except that the first grows out of the subject matter of the bill and the other does not. That which grows out of the subject matter of the bill must be set up in the interest of an end of litigation. That which does not, may be set up, if the defendant wishes, in one proceeding in equity quickly to settle all equitable issues capable of trial between them in such a proceeding even though they are not related. *Buffalo Specialty Co. vs. Van Cleef*, 217 Fed. 91."

If Equity Rule 30 is applicable in this proceeding, it must be conceded that the lower Court obtained juris-

diction over the respondent when the Trustee in Bankruptcy in accordance with Equity Rule 30 by appropriate allegations in his answer, claimed the cross-relief granted by the Referee. Under Equity Rule 30, it is entirely immaterial whether the cross-relief grew out of the transaction on which respondent's petition was based or grew out of an entirely distinct and unrelated transaction.

2.

If petitioner has misconceived the purpose and effect of the General Order and the Equity Rules are only "to be looked to for analogies" in the case at bar there is still ample reason for approving the procedure followed by the referee. Public policy requires that bankrupt estates be speedily administered without unnecessary litigation. Both parties were before the Court and the procedure adopted adjudicated all the controversies between them.

We have already noted in the preceding sections of this brief that a proceeding in bankruptcy is an equitable proceeding. It is an administration suit, and the adjudication vests the Trustee with title to the property of the bankrupt, and places it in the exclusive custody and control of the court of bankruptcy, and throws upon that court the duty of collecting, reducing to money and distributing the estate of the bankrupt, and of determining controversies relating thereto. These are equitable powers for performance of which the Congress very properly invested courts of bankruptcy with jurisdiction in equity.

Suits for administration, other than in bankruptcy, have furnished frequent occasions for resort to the general jurisdiction of equity. It is the settled rule of this Court that when an equity court in such a suit takes con-

trol of property for the purpose of administration or liquidation, it thereby withdraws such property from the jurisdiction of all other courts, and draws to itself incidental jurisdiction to hear and determine all questions respecting the title, possession or control of such property. This court has applied that rule to protect and enforce the paramount and exclusive jurisdiction of courts of bankruptcy over the property of bankrupt estates, actually or constructively in their possession or control. *Murphy v. John Hofman Co.*, 211 U. S. 562; *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734; *White v. Schloerb*, 178 U. S. 542; *Dayton v. Stanard*, 241 U. S. 588.

A summary and accurate statement of the rule that in such cases the primary jurisdiction is exclusive, as applied by this Court in bankruptcy proceedings, is embraced in the opinion of MR. JUSTICE ROBERTS in *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734, as follows:

> "Upon adjudication title to the bankrupt's property vests in the trustee with actual or constructive possession and is placed in the custody of the bankruptcy court, *Mueller v. Nugent*, 184 U. S. 1, 14, 46 L. Ed. 405, 411, 22 S. Ct. 269. The title and right of possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. *Robertson v. Howard*, 229 U. S. 254, 259, 260, 57 L. Ed. 1174, 1177, 33 S. Ct. 854; *T. E. Wells & Co. v. Sharp*, 125 CCA 46, 208 Fed. 383; *Galbraith v. Robertson-Hilliard Grocery Co.*, 133 CCA 46, 216 Fed. 842, 32 Am. Bankr. Rep. 752. It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. It may order a sale of real estate lying outside the district.

Robertson v. Howard, 229 U. S. 254, 259, 260, 57 L. Ed. 1174, 1177, 33 Sup. Ct. 854, supra; *Re Wilka* (D. C.) 131 Fed. 1004. When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts. *White v. Schloerb,* 178 U. S. 542, 44 L. Ed. 1183, 20 S. Ct. 1007; *Murphy v. John Hofman Co.,* 211 U. S. 562; 53 L. Ed. 237, 29 S. Ct. 154; *Dayton v. Stanard,* 241 U. S. 588, 60 L. Ed. 1190, 36 S. Ct. 695. This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property. *Murphy v. John Hofman Co.,* 211 U. S. 562, 53 L. Ed. 327, 29 S. Ct. 154, supra; *Wabash R. Co. v. Adelbert College,* 208 U. S. 38, 52 L. Ed. 379 28 S. Ct. 182; *Harkin v. Brundage,* 276 U. S. 36, 72 L. Ed. 457, 48 S. Ct. 268."

It is thus settled by the statutes, rules, orders and decisions, cited above, that jurisdiction in equity is conferred on courts of bankruptcy. The administration of a bankrupt estate is an equitable proceeding. The adjudication of bankruptcy places the property of the bankrupt actually or constructively within the control of the bankruptcy court. The jurisdiction of equity, having once attached, remains for all purposes to the end of the proceeding. The exclusive control of the property draws to the court the power to determine all controversies concerning its title, possession and control. In one respect, at least, the equity power of courts of bankruptcy is broader than the general equity jurisdiction of the federal courts. A court of bankruptcy may, by injunction, stay

proceedings in state courts, and that power is denied to federal courts of general equity jurisdiction.

The cases cited hold that property in possession of a trustee in bankruptcy can not be reclaimed by replevin or any form of action at law or in equity, in any court other than the bankruptcy court of primary jurisdiction. All such controversies are drawn to the bankruptcy court, as an incident of its equitable proceedings for administration and distribution of the property of the bankrupt.

Respondent's only resort for reclamation of property in the actual or constructive possession of the trustee, as an officer of the court, was the presentation of a petition in the equitable proceeding in the bankruptcy court. If a petition to reclaim property in the custody of an equity receiver had been presented to a court exercising general equity powers, the right of the receiver to present a cross-claim by answer, that also involved property rights of the estate in receivership, could not be doubted, in view of equity rule 30. In such case the claim of the petitioner, and the cross-claim of the receiver or trustee, are both, in fact, claims for reclamation of property in the actual or constructive possession and control of the court. Jurisdiction to determine all controversies in relation thereto resides in the bankruptcy court of primary jurisdiction.

Where the court of bankruptcy has power to determine a controversy in a summary proceeding, the trustee ought not to be, and cannot rightfully be denied the privilege of presenting a claim, by answer, that he could exercise under equity rule 30, if the same identical issue

tendered by respondent were presented in a plenary suit in equity for rescission of the sale of the bonds, and for an order for their delivery by the trustee to respondent.

3.

The appellant, by coming into the Bankruptcy Court and seeking affirmative summary relief, thereby gave the Court jurisdiction of its person, as to such issue, and all such defenses, including affirmative claims that may be properly litigated in that summary proceedings. Consent thus given cannot be withdrawn so as to deprive the Court of jurisdiction so obtained.

It is frankly conceded by all parties that a referee has no extra territorial jurisdiction and if the appellant was not in this court, the court could not have acquired jurisdiction by the serving of a show cause order on the appellant beyond its territorial limits. The appellee contends that the appellant, by coming into the bankruptcy court and seeking affirmative summary relief, thereby gave the court jurisdiction of its person as to such issue and all such defenses, including affirmative claims, that may be properly litigated in that summary proceedings. Consent thus given can not be subsequently withdrawn.

The rule was stated in *Operators Piano Co. vs. First Wisconsin Trust Co.,* (CCA 7) 283 Fed. 904, on p. 906 as follows:

> "Likewise, where the adverse claimant is himself a petitioner for relief in a summary proceeding, he opens the door to such defenses as the trustee in bankruptcy possesses, and all such issues and all such defenses (including affirmative claims) may be properly litigated in that summary proceeding. For a litigant cannot himself invoke the jurisdiction of the

court and the particular form of proceeding (summary as well as plenary) and then object to the disposition of the issues which the respondent (the trustee) may raise either as a defense to his petition or as the basis of a counterclaim. The consent thus given cannot be subsequently withdrawn."

The respondent will contend that the above excerpt is mere dicta and, therefore, not a controlling precedent. Whether this expression is necessary to the decision in that case is quite immaterial as the courts have subsequently referred to the quoted excerpt as correctly stating the rule, which is in harmony with the fundamental principles of modern equity practice. The reasons on which this practice is based apply with special force to summary proceedings in bankruptcy.

The Court of Appeals for the Seventh Circuit has, moreover, reaffirmed its holding in *Operator's Piano Company v. First Wisconsin Trust Co.* in the later case of *In re Bennett* (CCA 7) 285 Fed. 351:

"We have consistently upheld the jurisdiction of the bankruptcy court to determine controversies either in summary or in plenary proceedings, where the adverse party either invokes the jurisdiction or consents to a trial of the disputed issues in such proceedings. *Operator's Piano Co. v. First Wisconsin Trust Co.*, CCA 283, Fed. 904. And we might add that we think greater business efficiency and a more speedy administration of estates, together with greater uniformity in rulings, would be attained if all such controversies could, regardless of the objection of the adverse party, be determined in the bankruptcy court, the court having jurisdiction to administer bankrupt estates."

The same principle has been applied by other courts. *In re Pennsylvania Coffee Co.*, (D.C.), 8 Fed. (2d) 98.

In this case the petitioners filed a petition praying that the receiver be required to pay over to them certain moneys he had collected on accounts receivable, alleging that prior to bankruptcy the accounts had been assigned to them. The receiver filed an answer, denying the relief prayed for and also alleged that the assignments were invalid and asked for affirmative relief, praying that the petitioners be directed to pay over to him certain moneys collected on the assigned accounts. The special master found that certain of the assignments were valid and other assignments were void and also found the amount collected by the receiver on valid assignments and the amount collected by the petitioners on the void assignments. These amounts were set off and the petitioners were directed to pay the balance due the receiver. The money was not paid and an order to show cause issued. On this hearing, the petitioners objected to the jurisdiction of the court on the grounds "that the amount to be recovered from them could be recovered only in a plenary action and could not be offset in a summary proceedings of this sort." The court said (8 Fed. 2d. 88):

> "The precise question at issue here has been decided in favor of the receiver by the Circuit Court of Appeals of the Seventh Circuit in case of Operators' Piano Co. v. First Wisconsin Trust Co., 283 F. 904, 906, in which Evans, Circuit Judge, delivering the opinion of the court, says: 'Likewise, where the adverse claimant is himself a petitioner for relief in a summary proceeding, he opens the door to such defenses as the trustee in bankruptcy possesses, and all such issues and all such defenses (including affirmative claims) may be properly litigated in that summary proceeding.' That principle also finds support

in the following cases: In re Brantman, 244 F. 101, 156 CCA 529; In re Berry (D. C.) 247 F. 700; In re Drag (D. C.) 254 F. 474; In re Hollingsworth & Whitney Co. v. Boston, 242 F. 754, 155 CCA 341; Breit v. Moore, 220 F. 97, 135 CCA 573; Lincoln v. People's National Bank (D. C.) 260 F. 4222."

In *Triangle Electric Co. vs. Foutch,* (CCA 8) 40 Fed. (2d) 353, on p. 356 the court stated:

"One who has presented proof of debt has submitted his claim to the jurisdiction of the bankruptcy court, and must be deemed to have consented to the jurisdiction of that court to decide any defense that may be lawfully interposed. In re Carl Dernburg & Son, Inc. (CCA 2) 5 F. (2d) 37. Undoubtedly the bankruptcy court has the right to determine at the threshold whether a claim is really adverse or merely colorable. There is persuasive authority to the effect that a referee in bankruptcy has jurisdiction, on hearing objections to a claim on the ground that the claimant has received a voidable preference, or has knowingly received from the bankrupt a transfer of his property in fraud of creditors, to direct that the claim shall be allowed on return, within a specified time, of merchandise whose transfer constituted such preference or fraud. Metz v. Knobel et al (CCA 2) 21 F. (2d) 317; McCulloch v. Savings Bank (D. C.) 226 F. 309; In re W. A. Paterson Co. (CCA 8) 186 F. 629, 34 L. R. A. (N. S.) 31.

In the case of In re *Dernburg & Son, Inc.,* (CCA 2), 5 Fed. (2d) 37 referred to above, the trustee filed objections to a proof of debt on the ground that the claimant had obtained a voidable preference which he had not surrendered, and moved to have the claim expunged, disallowed, or reduced. The claimant objected to the summary proceedings before the referee, claiming that a plenary suit was necessary. The referee overruled the ob-

jection and proceeded with the hearing. The jurisdiction of the referee was sustained. The rule was stated in the syllabus as follows:

> "Under Bankruptcy Act, Section 57-G prohibiting allowance of claims unless creditor shall surrender voidable preferences, conveyances, transfers, assigns, or incumbrances, referee had jurisdiction to determine whether claimant who made proof of debt had received preferential payments on trustee's objection and motion to expunge proof.

The court in its opinion said:

> "Every person submitting himself to the bankruptcy court in the progress of the case for the purpose of having his rights in the estate determined makes himself party to the suit and bound in the legitimate course of the proceedings. As was said in Wiswall, et al, vs. Campbell, 93 U. S. 347, 23 L. Ed. 923; "A creditor who offers proof of his claim and demands its allowance, subjects himself to the dominion of the court and must abide the consequences."

In re Barnett, (CCA 7) 12 Fed. (2d) 73, the facts were as follows: The bankrupt had leased certain property from the United Cigar Stores and had deposited liberty bonds in the sum of $1,200 to secure the performance of the lease. The lease also under the laws of Pennsylvania gave the lessor a lien on the fixtures. On adjudication in bankruptcy, the United Cigar Stores cancelled the lease. The receiver of the bankrupt sold the fixtures for $625. The United Cigar Stores applied to the referee for an order requiring the trustee to pay it the $625 received from the fixtures. The trustee did not dispute the landlord's right to this property but claimed the liberty bonds. The referee sustained the claim of the trustee and directed the landlord to pay the trustee the

amount realized from the liberty bonds, less the $625 received from the fixtures. The twelfth paragraph of the syllabus is as follows:

> "Claimant's submitting to bankruptcy court, thereby consents to jurisdiction of court to decide any lawful defenses and his rights must be determined according to the bankruptcy act."

Affirming the action of the referee, the Circuit Court said:

> "Where a claimant submits his claim to the jurisdiction of the bankruptcy court, he thereby consents to the jurisdiction of the court to decide any defenses that may be lawfully interposed. In re Dernburg, 5 Fed. (2d) 37."

The opinion of the Chief Justice Waite in *Wiswall vs. Campbell,* 93 U. S. 347, 23 L. Ed. 923, involving a question of jurisdiction under the Bankruptcy Act of 1867 is luminating even if not controlling.

> "Congress, in enacting the bankrupt law, had apparently in view, (1) the discharge, under some circumstances, of an honest debtor, from legal liability for debts he could not pay; and (2) an early *pro rata* distribution, according to equity, of his available asset among his several creditors. Prompt action is everywhere required by law. In *Bailey vs. Glover,* 21 Wall, 346 we said, speaking through Mr. Justice Miller, that "it is obviously one of the purposes of the bankrupt law that there should be a speedy distribution of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay." The list of debts "entitled to share in the bankrupt's property" (Sec. 5091) is an important element in the settlement of the

estate. Without it there can be no dividend. Hence the necessity for as "quick and summary" a disposal of the question arising under this part of the case as is consistent with a reasonable protection of the rights of the parties in interest. *Every person submitting himself to the jurisdiction of the bankrupt court in the progress of the case, for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding. A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences,"*

The respondent, by invoking the aid of the bankruptcy court, submitted himself to its jurisdiction and "is bound by what is judicially determined a legitimate course of the proceeding." It opened the door to all "defenses (including the affirmative claims)" that could be litigated in summary proceeding. The respondent, as a matter of law, thus consented to the jurisdiction of the bankruptcy court in this matter, whether such consent was intended or not.

4.

Equitable terms may be imposed by a court as a condition of granting an order of reclamation.

In *Re Hooven-Owens-Rentschler Co.*, (CCA 6) 195 Fed. 424. In Michigan a petitioner for a rescission of a sale and for the reclamation of personal property is under obligation to account for money received in part payment. In approving a referee's order conditioning reclamation on the delivery to the trustee of the money for which petitioner was accountable, the Court said, p. 426:

"We find then, that petitioner, a resident of Ohio (the bankruptcy administration being in Michigan), was, if it rescinded the sale, liable to account to the bankruptcy trustee for the $560.00 received, and was subject to be sued at law *or in equity* in any court having personal jurisdiction over the petitioner. Under these circumstances petitioner invoked the action of the bankruptcy court in the general subject matter. Full personal jurisdiction over it was thereby acquired, and there was neither lack of jurisdiction nor abuse of discretion in directing, in that very proceeding, that petitioner should respond to the trustee for any such liability which in fact subsisted."

The court also said:

"We are holding by opinion this day filed in *Rode & Horn vs. Phipps,* 190 Fed. 414, that this unclassified proceedings by intervening petition in the bankruptcy court, even though they present only legal questions, are so far equitable in form that equitable remedies are appropriate. Much more is this true when the petition seeks, as this one did, whatever equitable relief the court may think proper, and when the remedy given by way of an imposed condition is of, at least, quasi equitable character."

It should be noted in this connection that the prayer of the appellant's petition for reclamation, besides asking for the return of said bonds, prayed "that your petitioner have such other and further relief as may be just and proper."

Remington on Bankruptcy, Vol. 5, page 602, Section 2455, states:

"Proceedings for reclamation, however, are equitable; and, consequently, the owner may be directed, as a condition precedent to the recovery, to

return the payments received by him on account of the purchase price, less suitable allowances for its use, depreciation, etc., where under the local law, such payments might have been recovered by an independent action."

In the case at bar, the trustee in bankruptcy held bonds of the then market value equal to approximately the amount of cash held by the appellant. If the court had found that these bonds were the property of the respondent and the respondent had a right to reclaim them could it be contended that the referee was without authority to require the respondent to pay the money it held as a condition precedent to the delivery of the bonds? It would, indeed, be a travesty on justice to obtain from the court its property and at the same time deny the court the right to order the return of money belonging to the bankrupt estate. If such a right existed, it was necessary for the trustee to set up these defenses in his answer. The trustee would, indeed, have been remiss if he had allowed the respondent to have taken property from his hands and not insisted on the delivery of assets of the bankrupt in the hands of the respondent. He who seeks equity, should do equity. It does not lie in the mouth of the person invoking the jurisdiction of a court of equity to deny that court the right to dispose of all equitable matters existing between the parties. If the petitioner has not enough confidence in the justice and ability of the court in which he seeks relief to be willing to subject himself to that court, he must stay away from the court for all purposes.

5.

Respondent's withdrawal after the issues had been made up and the hearing entered upon did not defeat the jurisdiction, previously attached, to determine the issue raised by the answer of the trustee.

In this case, the answer of the trustee was promptly filed, praying, among other things, for the affirmative relief in question and the matter was set down for hearing on the issues thus presented.

On the date set a continuance was granted at the request of the respondent's counsel. When the matter was taken up on the adjourned hearing, the respondent moved against the trustee's answer, which motion was overruled. The respondent then dismissed its application for reclamation, which the referee granted "only in so far as said petition or application seeks the reclamation of the securities therein described and it appearing that Herbert S. Daniel, Trustee, in his answer is seeking affirmative relief from the Guaranty Trust Company of New York and the issue raised by the pleadings on file should be heard forthwith * * *." (R. 20). It is fundamental that the act of the appellant did not deprive the court of its jurisdiction to proceed with the issue then before it.

Vidal vs. South American Securities Company, (CCA 2), 276 Fed. 855. The rule is stated in paragraph 13 of the syllabus as follows:

> "Where the counterclaims, under which equity rule 30, are substituted for cross-bills against certain defendants, set up causes of action within the jurisdiction of the court as a court of equity, and within its jurisdiction as a federal court because of the citizenship of the parties, except as to one cross-defend-

ant, they should not be dismissed, but should be treated as original bills on the dismissals of the original bill."

In the case of *Buffalo Specialty Company vs. Vancleef,* (D. C.) 217 Fed. 91, the defendant filed an answer under the new equity rule 30, which was in effect a cross suit. The original bill was later dismissed because the question was adjudicated on its merits in another action and the plaintiff contended that the dismissal carried with it the cross suit of the defendant. The court held to the contrary.

6.

The speedy administration of the Bankruptcy Law requires the application of the modern equity practice which permits the adjudication of all controversies between the same parties in one suit.

Prompt administration is required by the bankruptcy act. The act makes ample provisions to facilitate the administration and distribution of bankrupt estates. That purpose has been frequently emphasized by this court in its decisions under the Act of 1898, and also under the Act of 1867. The arm of the bankruptcy court should be the last, of all courts exercising equity powers, to be fettered by unnecessary restrictions in matters of form and procedure. As far as possible the bankruptcy court of primary jurisdiction should be left free to promptly exercise its statutory authoritory to determine all questions concerning the collection and distribution of bankrupt estates.

The repeated holdings of this court are to the effect that referees in bankruptcy have summary jurisdiction

to require the delivery to the trustee of the bankrupt's property in the hands of any person not having an adverse claim thereto; and also to determine adverse claims where the property is actually or constructively in the trustee's possession. (*Mueller v. Nugent,* 184 U. S. 1; *May v. Henderson,* 268 U. S. 111; *Harrison v. Chamberlain,* 271 U. S. 191.

Shall General Order XXXVII be applied in courts of bankruptcy and in bankruptcy proceedings, as distinguished from plenary suits invoking the general equity powers of District Courts? Section 30 of the bankruptcy act assigns to the Supreme Court of the United States the function of making orders to govern the practice in courts of bankruptcy; and the general order in question appears, in terms, to adhere to the statute.

If the equity rules of procedure are to be followed as near as may be in equitable proceedings in courts of bankruptcy, it is apparent that the discarded requirement that cross-demands must be germane to the subject matter of the original petitioner's cause of action, is not a rule of practice in such courts.

There is certainly as much need to simplify the practice in bankruptcy and to facilitate the settlement of cross-demands in one proceeding, as there is in proceedings under the general equity powers of the District Courts.

The new equity rules effected a great and needed reform in the general practice of equity. The court has apparently, by General Order XXXVII, extended the reformation to courts of bankruptcy for the purpose of

simplifying and expediting their proceedings. Will this court suffer the nullification of its progressive rules and orders?

7.

The final decision of the Court is not a test of jurisdiction.

The jurisdiction of the bankruptcy court to decide the issues was not dependent upon the nature of its decision for or against the claimed right of reclamation, nor upon whether its order acting in personam could be enforced within the district where the court sat. It may be conceded that such an order could not be enforced by direct process if the party against whom it ran departed from and kept without the district. That would be true whether he was domiciled within or without the district. A contingency might arise in either case making resort to ancillary proceedings in another district necessary, as was done in *In re Small Shoe Co.* (CCA 2), 5 Fed. (2d) 956. An order acting in personam against a party who is actually before the court, by appearance or process, is nevertheless valid.

8.

Courts of bankruptcy in exercise of their equity powers act in personam and have summary jurisdiction where a party voluntarily appears or can be served with process, regardless of the location of the res or domicile of the party.

The bankruptcy court has power to make an order concerning the disposition of property of the bankrupt against a party actually before it, either by voluntary appearance or by service of process. To this effect is the decision of this court in *Robertson v. Howard,* 229 U. S. 254, 264, cited in other portions of this brief. The power

of the bankruptcy court of primary jurisdiction to order the conveyance of real estate situate in another state was maintained by that decision. The case was cited and its doctrine reaffirmed in the opinion by MR. JUSTICE ROBERTS *in Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734. Other cases holding that orders for delivery or other disposition of the property of bankrupts are essentially equitable in their nature and act in personam and are therefore valid, although the situs of the res is without the district, are: *Alco Film Corp. v. Alco Film Service* (CCA 2), 234 Fed. 55, 57; *Orinoco Iron Co. v. Metzel* (CCA 6), 230 Fed. 40; *In re Britannia Mining Co.* (D. C. Wis.), 197 Fed. 459.

In *Orinoco Iron Co. vs. Metzel,* supra, the court said:

> "Generally speaking, the jurisdiction of courts of bankruptcy in the administration of bankrupt estates extends 'to all matters of bankruptcy without limitation. It is coextensive with the United States'. It knows no state or district boundaries. Thomas v. Woods, supra, at page 590, of 173 Fed., 97 CCA 535, 26 L. R. A., (N. S.) 1180, 19 Ann. Cas. 1080; Lathrop v. Drake, 91 U. S. 516, 517, 23 L. Ed. 414; Babbitt v. Dutcher, 216 U. S. 102, 109, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Staunton v. Wooden (CCA 9th Cir.) 179 Fed. 61, 63, 102 CCA 355. It may order the sale of land in another state, and without ancillary proceedings therein. Robertson v. Howard, 229 U. S. 254, 261, 33 Sup. Ct. 854, 57 L. Ed. 1174. True, the bankruptcy court may not enforce its process or its orders outside the limits of its territorial jurisdiction, that is to say, its jurisdiction must be exercised within its own district; but, having the proper parties before it, it can within its own district make necessary orders to protect its jurisdiction. And a court of bankruptcy in another jurisdiction could, if necessary, entertain ancillary proceedings for the re-

covery of property. Babbitt v. Dutcher, supra, at page 105, of 216 U. S., 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969. And see Elkus, Petitioner, 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. 407.

"A court of bankruptcy, in determining conflicting claims to property in its custody acts essentially as a court of equity; and we think the case presented is within the well-established rule that, where the necessary parties are before a court of equity, it is immaterial that the subject-matter of the controversy, whether real or personal property, is beyond the territorial jurisdiction of the court. In such case the power exists to compel a defendant to do all things necessary which he could do voluntarily to give full effect to the decree against him. Obedience to the decree so made is enforced by means of process against the person. We cite in the margin a few of the many authorities asserting this jurisdiction."

It is of course conceded that the process of the bankruptcy court can not be enforced beyond its territorial limits. If the order of the referee is affirmed it may be necessary to invoke the aid of the court in New York as was done in *In Re Small Shoe Co.*, (CCA 2) 5 Fed. (2d) 956. There the summary turnover order was entered at the domicile of the bankrupt by the court of primary jurisdiction. The bankrupt then left the territorial jurisdiction of the court without complying with the order. The bankrupt was found in Connecticut and the District Court of Connecticut issued a show cause order why he should not be committed for violating the said turnover order. The Circuit Court held the turnover was res adjudicata of the facts and the order could be enforced in an ancillary proceeding either by a direct order of committment for contempt or by the milder course of issuing a show cause order first.

The ultimate enforcement of the decree is not the test of jurisdiction, neither does it follow that because the respondent is a non-resident the order can not be enforced by process in Nebraska. The respondent has an extensive banking business and loans money thruout the country. It may well be that some of the debtors are within the jurisdiction of the Nebraska court so the funds or property of the respondent could be reached by attachment, garnishment or equitable sequestration. In any event the non-residence of the respondent does not militate against the validity of the turnover order in question.

Staunton v. Wooden (CCA 9) 179 Fed. 61, cited in the opinion of the lower court herein, is not in conflict with the doctrine here maintained, nor with the cases last above cited. There was no voluntary appearance by Staunton. He resided without the district in which the bankruptcy proceeding was pending, and an order to show cause was served without the district. Staunton's only appearance was special for objecting to the jurisdiction. It was ruled that the court could not send its process without the District. That holding is not a precedent for the instant case, where respondent voluntarily appeared by a petition for relief in his own behalf. Here respondent was already before the court in an equitable proceeding, and under the reformed practice in equity had submitted its person to the jurisdiction of the court to determine the cross-claim presented in the trustee's answer to its own petition.

III.

ANCILLARY JURISDICTION DOES NOT BAR THE COURT OF PRIMARY JURISDICTION FROM ACTING IF THE NON-RESIDENT PARTY VOLUNTARILY APPEARS BEFORE IT.

The Circuit Court stated (R. 47) "Appellant (now the respondent) does not question the authority of a bankruptcy court, through ancillary proceedings in the territorial jurisdiction of appellant's residence, to order the delivery of the bankrupt's assets, but appellant asserts that it was not subject to the order of the referee in this case although it had filed a petition in reclamation before him." Upholding the contention of the respondent, the Circuit Court apparently held that this case is ruled by *Babbitt v. Dutcher,* 216 U. S. 102, and *Elkus, Petitioner,* 216 U. S. 115, both holding to the effect that under the original bankruptcy act, as passed in 1898, the respective district courts have ancillary jurisdiction in aid of bankruptcy proceedings pending in another district. The theory of the decision here in question seems to be that since such ancillary jurisdiction exists, the court of primary jurisdiction is wholly without power to make a turnover order against any one who is domiciled without its territorial limits. It is submitted that such theory is unsound and in conflict with *Robertson v. Howard,* 229 U. S. 254.

Among other expressions contained in the opinion in the instant case, evidencing the adoption and application of that untenable theory, are the following:

> "The courts of bankruptcy may act in the exercise of their jurisdiction *in their territorial limits,* but there may be ancillary bankruptcy proceedings *in*

other districts, in aid of the bankruptcy court exercising primary jurisdiction. Bank. Act. §2(20); *Babbitt v. Dutcher,* 216 U. S. 102; *Elkus, Petitioner,* 216 U. S. 115; *Lazarus v. Prentice,* 234 U. S. 263. An order by the referee directing appellant, *as a resident of New York,* to surrender to the trustee property which it held there, would be beyond the ordinary powers of the referee. *Staunton v. Wooden,* 179 Fed. 61." (R. ~~47~~ 40.)

"Appellant sought to recover certain bonds to which it claimed title. The trustee sought an order that appellant should pay over money of the bankrupt estate received by appellant, after bankruptcy. The proceedings would not have been more unrelated to each other, if the trustee had sought an order on appellant for the delivery of books and papers, such as was asked in *Babbitt v. Dutcher,* 216 U. S. 102, or an order for the examination of witnesses, such as was asked in *Elkus, Petitioner,* 216 U. S. 115." (R. ~~49~~ 42.)

The ancillary jurisdiction, under the act as it was passed in 1898, is well settled by the cases cited; and, as if some doubt had still existed, subdivision 20 of Section 2 (U. S. Code Tit. 11 §11) was added by amendment in 1910, investing courts of bankruptcy with express power to "exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

The bearing of this existing *ancillary* jurisdiction upon the issue involving the powers of the court of *primary* jurisdiction, was wholly misconcieved and misapplied by the Circuit Court of Appeals. The existence of the ancillary jurisdiction presupposes and affirms jurisdiction of the primary court over the subject of the pro-

ceeding. Aid of the existing primary jurisdiction of another court, is the sole and exclusive object for creation of the ancillary jurisdiction. Ancillary jurisdiction can only be exercised by one district court when primary jurisdiction exists in another bankruptcy court. Where one against whom relief is sought is not within the reach of the process of the primary court, resort to the ancillary jurisdiction of the court of his domicile becomes necessary. *Shortridge vs. Utah Savings & Trust Co.* (CCA 10), 40 Fed. (2d), 328. But such resort is not required where the non-resident party *voluntarily appears* in the court of primary jurisdiction, and presents a petition for summary relief in his own behalf.

The decision by the lower court of the question now under consideration is at war with the holding of this court in *Robertson v. Howard,* 229 U. S. 254, 264, in which it was said in the opinion by MR. CHIEF JUSTICE WHITE:

> "Even if the enlarged powers of a court of bankruptcy over the estate under its control be put out of view, and the subject be looked at as a mere question of equitable jurisdiction, it may not be doubted that a court of equity in one state, in a proper case, could compel *a defendant before it* to convey property situated in another state. *Fall v. Eastin,* 215 U. S. 1, 8, et seq. 54 L. Ed. 65, 69; 23 L. R. A. (N. S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853, and cases cited. There being thus ample power in the court, it follows, of course that resort to ancillary proceedings was unnecessary. The decision in *Babbitt v. Dutcher,* 216 U. S. 103, 54 L. Ed. 402, 30 Sup. Ct. Rep. 372, 17 Ann. Cas. 969, to the effect that district courts, other than the court in which the original proceedings in bankruptcy are instituted, possess power in proper cases to exert ancillary jurisdiction in aid of the court in which the bankruptcy proceedings are pending,

lends no support to the contention that the court which had full power could not exert its ample authority without invoking the ancillary power of another and different court." (229 U. S. 261-262.)

The Opinion of MR. CHIEF JUSTICE WHITE, *from which* the foregoing excerpt is taken, is an authoritative precedent, condemning the decision of the Circuit Court of Appeals, and upholding that of the referee and the District Court. It condemns the theory of the decision of the Circuit Court of Appeals that because it was possible for the trustee to resort to the ancillary jurisdiction of the District Court for the Southern District of New York, the District Court for the District of Nebraska could not exert its ample authority against the Guaranty Trust Company, *that was already before it with a petition of reclamation,* to make a turnover order involving a fund in its hands collected for the bankrupt estate, after the adjudication of bankruptcy. The opinion of the Chief Justice here cited and relied upon, renders all citations of the lower court, maintaining ancillary jurisdiction, immaterial and inapplicable, and leaves the judgment of the lower court unsupported and foundationless.

IV.

WEIDHORN V. LEVY, 253 U. S. 268, 64 L. ED. 898 IS NOT APPLICABLE TO THE ISSUES RAISED IN THIS CASE.

The Circuit Court opinion cites and quotes from the Weidhorn case as though it had a bearing on the question at issue here. It is hard for the petitioner to follow the reasoning of the Circuit Court in this respect. The question there determined is well summarized in the concluding paragraph of the opinion:

> "Reviewing the entire matter, we conclude that under the language of the Bankruptcy Act and of the General Orders in Bankruptcy a referee, by virtue of a general reference under Order XII, (1), has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under §70e, and affecting property not in the custody or control of the court of bankruptcy."

If the Circuit Court construed this case as holding that General Order XXXVII only makes the equity rules applicable to independent plenary suits, we can not agree with such a construction. No such issue was there involved. As pointed out in other sections of this brief, such a construction is unwarranted. The equity rules are made applicable to separate plenary suits in equity by their own inherent power. If only applicable to plenary suits, no procedure is prescribed for summary proceedings. It is much more reasonable to believe this court intended by General Order XXXVII to provide rules for a proceeding otherwise unprovided for than to believe this court intended the useless act of prescribing the equity rules to plenary suits where the rules by their own force already necessarily apply.

The *Weidhorn* case, while holding that the referee is without jurisdiction in independent plenary suits, concedes jurisdiction to referee in summary administrative matters. The case at bar is of the latter type and jurisdiction in such matters is now too firmly established by the well reasoned judgments of this court to be subject to question.

V.

THE MERITS OF THE CASE.

1.

The case was correctly decided by the Referee.

On the merits there can be no doubt as to the correctness of the Referee's order. The amounts and dates of collections as well as the amount applied in satisfaction of the bankrupt's demand loan account are all taken from the statements furnished petitioner by the respondent (R. ~~16~~ 36 & ~~41~~). The trustee made no objection to any of these figures; nor is he questioning the respondent's application of part of the funds to satisfy the bankrupt's demand loan account. Error can never be based on findings derived from the respondent's own accounts.

The respondent held excess collateral. After bankruptcy, it collected this collateral. For whom? Necessarily for the benefit of the bankrupt estate as agent of the receiver and trustee. The law implies a proper motive until the contrary is shown.

The respondent may contend that it has a right to retain part of the money as a setoff on the claim it is alleged to have purchased from The Guaranty Company. The referee, the District Court, and the Circuit Court all found against this contention. In the first place, there is no evidence that it ever purchased the claim of The Guaranty Company. No proof was offered at the hearing on this point. No issue was framed or contention made that it was the owner of such a claim, or, if it was the owner, that it claimed the right of setoff. Is it reasonable to believe that respondent would come all the way from New

York to Nebraska to prosecute a reclamation action if it could satisfy an alleged debt by the simple process of applying the funds already on hand?

2.

As a matter of law, no setoff could exist. A debtor can not acquire claims after insolvency and in contemplation of bankruptcy and use them as a setoff. Neither can the liens be obtained on the bankrupt's property acquired after bankruptcy.

As shown in the statement of the case supra, Peters Trust Company was adjudged insolvent and a receiver was appointed by the state court to liquidate its affairs on November 25, 1929. This in itself was an act of bankruptcy. These facts were known to respondent on the 25th when it impounded its bank account. An officer of the bankrupt called on the Vice President of the respondent on November 26th and explained the situation. An involuntary petition for adjudication in bankruptcy was filed on November 27, 1919. On the same day, respondent is alleged to have purchased the claim of The Guaranty Company.

§68 of the Bankruptcy Act, Title 11, §108, U. S. Code, provides:

> "A setoff or counter claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

The authorities on this point are collected in *Collier on Bankruptcy,* 13th Ed., Vol. 2, p. 1618; *Remington on Bankruptcy,* Vol. 4, p. 182 §§1465-1466.

The burden of proof was upon the respondent to show the assignment was received before bankruptcy and without knowledge of the impending bankruptcy. *Remington on Bankruptcy,* Vol. 4, p. 1466, *In re: Shults* (D. C.) 135 Fed. 623. The respondent offered no evidence and the evidence offered by the trustee was all to the contrary.

Deposits made after the filing of bankruptcy can never be used as a setoff. The rule is stated in *Collier on Bankruptcy,* 13th Ed.; Vol. 2, p. 1614 as follows:

> "Deposits made after the petition against the bankrupt was filed belong to the trustee; the right to setoff only applies to deposits in bank when the petition was filed, although the bank had no notice of it."

The case found on pages 26 to 33 of this brief support this proposition.

VI.

ANSWER TO RESPONDENT'S THEORY.

In view of fact that this case was briefed and argued in both the District Court and the Circuit Court, it may not be out of place to anticipate some of the arguments of the respondent.

The respondent first contends this is a replevin action at law and not a proceedings in equity, relying on

the case of *General Phonograph Corp. vs. Fanning*, (CCA 3) 6 Fed. (2d) 115. In the opinion, the court said:

> "A reclamation proceeding in bankruptcy is, in effect, a proceeding in rem, partaking, except for its summary character, of the legal aspects of a proceeding in replevin. It is directed against property in the possession of another, a trustee in bankruptcy, to regain which a claimant must affirmatively establish his own right to possession by proving ownership, absolute or qualified. And he must do this by allegations and proof sufficient according to the strictest practice to sustain an action in replevin."

The holding is merely that the same strict proof required in replevin actions is also required in a reclamation proceeding. This is far different from holding that a reclamation proceedings in bankruptcy is an action at law and therefore the equity rules do not apply. We have already seen that the referee may make the relief conditional on applicant's doing equity, *In re Hooven-Owens-Rentschler Co.* (CCA 6) 195 Fed. 424 and that the entire proceeding in bankruptcy is a proceeding in equity (Brief p. 37).

Respondent next contends a referee is without jurisdiction to enter a money judgment. In this, we agree. The respondent, however, fails to note the distinction between jurisdiction to enter a money judgment and jurisdiction to make turnover orders. The former is enforced by execution, the latter by committment for contempt. The lower court had this distinction clearly in mind and merely made a turnover order. It did not attempt to enter a money judgment.

The respondent also contends that referee is without summary jurisdiction to adjudicate the rights of adverse claimants if the property is not in the actual or constructive possession of the bankruptcy court. This is admitted. The referee has jurisdiction to see if the asserted claim is real and substantial or merely colorable. If of the latter class, the referee may retain jurisdiction. Here the referee found no adverse claim was asserted and that none in fact existed so proceeded to enter an order on the merits. This procedure has been approved several times by this Court.

The respondent also argued that a right of setoff is an adverse claim and cited several cases where the claimants were allowed to set off bank deposit made prior to bankruptcy. In all of these cases, both the deposit was made and the debt existed before the bankruptcy proceedings were started. Thus mutual debts and mutual credits existed when the petition was filed. In the case at bar, the money was collected long after bankruptcy when no right of setoff could attach. Also the claim must have been purchased by the respondent if purchased at all for the sole purpose of obtaining an illegal preference. Therefore, the proposition and citations of the respondent do not apply here.

CONCLUSION.

On the merits this case presents a bald refusal to turn over to the trustee in bankruptcy the funds and assets of the bankrupt estate. No claim or lien was asserted against these funds and as a matter of law none could be legitimately asserted. The referee under these circumstances had jurisdiction of the subject matter to make the turn over order in question. Since this Court has several times so construed the Bankruptcy Act, this phase of the case is not open to question.

The main contention of the respondent seems to be that the referee was without jurisdiction over the person of the respondent; that the respondent is a non-resident of Nebraska and by coming into Nebraska and invoking the aid of the Bankruptcy Court for its own relief, it did not submit itself to the jurisdiction of the court for counter affirmative relief. This is directly contrary to the holding of the District Court and referee but apparently is the view taken by the Circuit Court.

Such a contention is at war with Equity Rule 30 and General Order XXXVII. This Court by adopting Equity Rule 30 made a much needed reform and took a step decidedly in the direction of progress. It tends to put an end to litigation rather than encourage a multiplicity of actions. Is this reform carried over into bankruptcy proceedings or are bankruptcy proceedings still relegated to the archaic practice abolished by Equity Rule 30? Congress authorized this Court to prescribe rules of practice for bankruptcy proceedings and in obedience to this authority the Court wisely promulgated General Order

XXXVII, thereby adopting the equity rules as far applicable as rules of practice in bankruptcy. Any other construction of the unequivocal language of this General Order is unwarranted and the Order would be without function or purpose.

Even if General Order XXXVII had not been adopted, the best equity practice should be followed in bankruptcy. A bankruptcy proceeding is an equitable administration proceeding. One of the main purposes of the Bankruptcy Act is to provide a speedy and economical administration of the bankrupt's assets wherever located. The administration would be greatly hampered if those present in court, reaping the benefits of the Act, can withhold the property of the bankrupt and refuse to recognize the authority of the court to direct its delivery to the trustee. Why should the trustee be forced to go to the four corners of the United States to seek the assets of the bankrupt when those who hold them are personally present in court? Such a holding would make for inefficiency, delay, and added expense.

The court of primary jurisdiction should have exclusive jurisdiction as far as possible. Ancillary proceedings may be resorted to as an aid to the court of primary jurisdiction but never oust the primary court of jurisdiction over persons before it.

The respondent consented to the jurisdiction of the referee in this matter. This consent may not have been consciously given but as a matter of law coming into a court, invoking its aid, is a grant of jurisdiction over the person as to all matters over which the court might exer-

cise jurisdiction. This consent is not limited to merely defensive matters, but includes all equitable controversies between the parties, whether arising out of the same transaction or out of unrelated transactions. This proposition is grounded on reason and sanctioned by the adjudications of the Federal Courts.

We, therefore, submit that both precedent and reason require the approval of the procedure followed by the referee and District Court and the rejection of the action of the Circuit Court, and respectfully pray that the turnover order here in question be affirmed.

Respectfully submitted,

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PAUL L. MARTIN,
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Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 179

HERBERT S. DANIEL, TRUSTEE OF PETERS TRUST COMPANY, BANKRUPT, PETITIONER,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, RESPONDENT.

REPLY BRIEF OF PETITIONER

HALLECK F. ROSE,
ARTHUR R. WELLS,
PAUL L. MARTIN, AND
WINTHROP B. LANE,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

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HERBERT S. DANIEL, TRUSTEE OF PETERS TRUST COMPANY, BANKRUPT, PETITIONER,

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GUARANTY TRUST COMPANY OF NEW YORK, RESPONDENT.

REPLY BRIEF

The corner stone of the respondent's position, as disclosed by its brief, is that the order of the referee, if affirmed, would wrongfully deny respondent of the right of a plenary action. If this right is not established, its whole argument must fall. The right to be heard in a plenary suit is based on two assumptions: (1) that it had an adverse claim to the funds in question and, (2) that as regards the $23,724.60 it was a mere debtor and therefore not subject to the summary jurisdiction of the court. Both of these positions are untenable.

It can not occupy the position of an adverse claimant for three reasons:

First. It asserted no adverse claim when the matter was before the referee. Its petition for reclamation (R., 1) made no mention of this fund. Paragraph 8 (R., 6) of Trustee's answer and the prayer (R., 7) sets out the claims of the bankrupt estate to these funds and prays for a summary turn-over order. The respondent moved to strike this portion of the answer "for the reason that this pertains to an entirely separate issue" (R., 8). The motion was not based on alleged adverse claim. After the motion was overruled the respondent filed a written dismissal (not found in the record) and as he was preparing to leave the room made the statement relied on by respondent (Br., 32-33). This was followed by the statement (R., 10): "The Guaranty Trust Company, by its attorneys, aren't interested in this proceeding. We do not believe we are in court, and we are not interested to stay." We submit such a statement of counsel is not a pleading and cannot be construed as an adverse claim. Both the referee (R., 22) and the Circuit Court (R., 40) found no adverse claim was asserted. It must be pleaded or it is waived. *Gamble* v. *Daniel*, 39 Fed. (2d) 447. The very filing of the reclamation proceedings negatives the suggestion that it was making a claim to these funds.

Second. The evidence fails to disclose an adverse claim in fact. The respondent took the assignment from the Guaranty Company after the bankrupt had been adjudicated insolvent and a liquidating agent had

assumed control (Respondent's Br., 2), all of which was then known to respondent (R., 16). The assignment could have been for no other purpose than to obtain an illegal preference and cannot be used as a set-off in bankruptcy. The respondent in several places refers to a "collateral pledge agreement" as giving it some lien on these funds. No such an agreement is found in the record and it is submitted that none exists. Furthermore such an agreement would be void under the bankruptcy laws if it applied to claims purchased in contemplation of bankruptcy. The respondent also states, on page 3 and other places, that it made a debit on the bankrupts "demand loan account" on November 27 for the amount of the assigned claim. The statement in evidence (R., 18-19) does not show such a debit. Hence respondent "paraphrased" the statement (Br., 46). The only purpose of this "paraphrasing" was to insert this debit, which was not in the statement as rendered. It is submitted no debit was in fact made until after it abandoned its reclamation action. The referee correctly found (R., 22) the respondent "has no claim to the said fund."

Third. The respondent made no complaint of the findings of fact of the referee in its petition for review (R., 23-24). The findings of fact are therefore conclusive. This is also true because the appeal to the Circuit Court was taken under Section 23*b* of the Bankruptcy Act, which takes the place of the former petition to revise. The respondent conceded it had no direct right of appeal and therefore presented its petition

to the Circuit Court for allowance. Under these proceedings only questions of law are considered. Therefore respondent is now precluded from asserting it had an adverse claim.

The respondent's second proposition is equally untenable. On the date of adjudication it held over $31,000 surplus collateral in the form of real estate mortgages. For this collateral it was accountable to the receiver and trustee of the bankrupt. At a later date it converted this collateral into cash. A fiduciary cannot thereby change its relation to a "simple debtor-creditor relation." It was still under a duty to account for this collateral, which duty is enforceable in a summary proceeding. The reasoning of this Court in *May* v. *Henderson*, 268 U. S. 111, is applicable here.

There is no merit in the respondent's suggestion (Br., 24) that because it had a right to collect the collateral and apply the proceeds on the bankrupt's loan it could comingle the funds so collected after this loan was satisfied. As soon as the loan was fully paid (Feb. 12, 1930) it was required to hold the balance for the petitioner. Furthermore, we see no reason why the funds thus collected should be treated different from any ordinary bank account. The respondent honored one check of the petitioner for $7,500 on this account and should have honored a check for the balance.

The petitioner frankly concedes that a simple debt, due the bankrupt before bankruptcy, can not be collected by a summary proceedings and therefore the collection of stockholders liability and similar cases cited by respondent are not in point.

To make it clear, we repeat the petitioner does not admit the respondent was entitled to have its rights determined in a plenary action but, on the contrary, contends that it was always subject to a summary proceeding; that by coming into the bankruptcy court in Nebraska it did not waive its right to a plenary hearing because it never had such a right, but merely submitted its person to the jurisdiction of that court. If the Nebraska court could not have obtained jurisdiction of the respondent, a summary ancillary proceedings could have been brought wherever the respondent could have been found.

The respondent in its Proposition I (Br., 10) urges that the referee had no jurisdiction to entertain the petitioner's counterclaim. This is based on two grounds: First, General Order XXXVII does not make Equity Rule 30 applicable to bankruptcy proceedings and, second, there is no binding precedent for such a counterclaim. The first theory is answered on pages 36 and following of petitioner's brief. We believe this is a "proceedings in equity, instituted for the purpose of carrying in effect the provisions of the Act," and thus controlled by General Order XXXVII. If this is not such a proceedings, what kind of a proceedings is it?

The respondent also argues (Br., 14) some of the equity rules are "impossible of application" in bankruptcy and therefore the General Order only referred to plenary suits to which the equity rules, by their inherent power, already apply. The rules that are "impossible of application" are not pointed out but, if

any such exist, full provision is made for them in the Order itself. The Order provides that the rules "shall be followed as nearly as may be" and further provide for certain modifications by the trial court.

On the second contention respondent cites no cases, holding that the referee has no jurisdiction to entertain a counterclaim when the counterclaim is within the jurisdiction of the referee as prescribed by the Bankruptcy Act. The cases referred to are all cases of recovery of fraudulent preferences or similar matters over which the referee is expressly denied jurisdiction.

We are not, therefore, asking for "a limitless extension of the power of a referee" as stated by respondent (Br., 17) but rather that the referee be allowed to exercise the power vested in him by the Bankruptcy Act. If upon personal service of the respondent within the territorial jurisdiction of the referee, the referee could not have made the order in question, he could not do so on the counterclaim of the petitioner. No sufficient reason is suggested why the reverse of this is not also true.

The respondent has not correctly analyzed the cases cited by petitioner on pages 50 to 56 of his brief. The respondent (Br., 21) states the petition In re Pennsylvania Coffee Co. "was filed as a *plenary* suit." This is not true. The court in the opinion expressly held a plenary suit was not necessary. In re Barnett the referee on the trustee's counterclaim summarily ordered the petitioner to turn over the proceeds of the bankrupt's bonds which it held. It did not merely

refuse to allow a claim as stated by respondent (Br., 22). The counterclaim was used as a sword, not merely a shield. We believe that some of these cases are precedents for the petitioner's position but if there are no precedents and this is virgin soil, the rule announced in the cases cited by petitioner (Br., 50-56) is fundamentally sound and should be established by such a holding of this court.

The respondent admits (Br., 18) that if in the reclamation proceedings the referee had found the bonds should be delivered to the respondent, the order could have properly been conditioned upon the respondent surrendering the funds in question. It was therefore necessary for the Trustee (now petitioner) to plead the facts set out in paragraph 8 of his answer. Consequently, the allegations are germane and the referee did not error in refusing to strike this part of the answer.

The last contention of the respondent that the order of the referee, affirmed by, and also made the order of the District Court, was in effect a money judgment, is without merit. Both the referee and the District Court was fully aware of its limitation in this respect and only entered a turnover order. Whenever the subject of a turnover order is money, the practical effect of the order may be similar to a money judgment but this does not make it a money judgment or transgress the limitation on the power of the referee.

The last point to be noted is the respondent's plea that on an order of reversal it should be given the privilege of reopening the entire case. Equity does not

require the granting of such a privilege. The respondent tried to obtain a favored position. It was not satisfied to come in and share with the other creditors. The Trustee is guilty of no sharp practice but only fulfilled his duty in opposing the respondent's attempt to obtain an illegal preference. The Trustee went further and pointed out that a claim should be filed (R., 6). The respondent had from April 25 to June 10 to file such a claim after the referee's order was entered. It is therefore submitted there is no reason for granting the respondent's unusual request. Whether a claim may still be filed under Section 57*n* is not before this court, so need not be considered here.

In conclusion, the petitioner prays that the holding of the Circuit Court be reversed and the turnover order of the referee be affirmed.

Respectfully submitted,

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In the
Supreme Court of the United States

OCTOBER TERM, 1931

No. 179

HERBERT S. DANIEL, TRUSTEE OF PETERS TRUST COMPANY, BANKRUPT,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

THE ISSUE

The exact situation out of which the question of jurisdiction decided by the Circuit Court of Appeals arose was as follows:

The respondent, Guaranty Trust Company, is a New York Corporation, without situs or agency in Nebraska.

It appeared in the bankruptcy court in Omaha by filing a petition for reclamation of certain specific bonds which its assignor had sold to Peters Trust Company a short time prior to its being adjudicated a bankrupt. The respondent asserted its right to reclaim the bonds and recover possession thereof from the trustee because of alleged fraud, as the result of which the sale was void and title to the bonds did not pass; in other words, the respondent brought what amounted to a replevin suit for the bonds.

General Phonograph Corp. v. Fanning (C. C. A.), 6 F. (2nd) 115.

The trustee filed an answer to the respondent's petition for reclamation in which, after denying respondent's right to repossess the bonds in question, he alleged that the respondent had $31,224.60 in its possession belonging to the bankrupt estate, which had been accumulated after the adjudication, and prayed for an order directing the respondent to pay said sum to the trustee. The trustee, by his answer, thus asserted the right, not only to meet the issue tendered by respondent in its petition for reclamation, namely, the title to and right to possession of the specific bonds sold in November, 1929, but also to interject into the reclamation suit a separate and distinct cross-action of his own against the respondent, not in the nature of defense or counterclaim to the respondent's claim to the particular bonds in question, but involving a complicated series of other and different transactions and accounts, as well as a balance of money on deposit with respondent in New York.

The Circuit Court of Appeals, in its opinion in this case (Printed Record, p. 49) summed up the situation by

saying that respondent's petition for reclamation was one proceeding in bankruptcy and the attempted cross-action by the trustee in his answer was another.

> "The two proceedings were quite distinct. Appellant sought to recover certain bonds to which it claimed title. The trustee sought an order that appellant should pay over money of the bankrupt estate received by appellant, after bankruptcy. * * * We have been cited to no authority for the proposition that a creditor or other petitioner asking specific relief against a bankrupt's estate, as provided by the Bankruptcy Act, thereby becomes subject to summary orders by the referee in matters entirely disconnected from the subject matter of such claim or petition, and no such authority is believed to exist."

It is stated on page 7 of the petition for a writ of certiorari herein that the sole question raised by the record is:

> "Did the respondent by appearing voluntarily and invoking the summary powers of the referee for affirmative relief in the course of the administration of the bankrupt estate, submit its person to the jurisdiction of the referee for the purpose of determining a claim of the trustee for relief set up in an answer to respondent's petition, and filed while respondent's petition was pending?"

More accurately stated, and narrowed down to the point actually in issue here, the sole question raised by the record is as follows:

> Did the respondent, by filing a petition for reclamation, thereby invoking the summary jurisdiction of the referee to determine the title and right to possession of certain specific personal property in the possession of the trustee, submit its person to the juris-

diction of the referee to determine a claim of the trustee set up in his answer to the reclamation petition involving matters wholly unrelated to the reclamation issue?

The Circuit Court of Appeals said "No" to the foregoing proposition, stating that it had been cited to no authority and had found none to the contrary.

II.

CROSS-ACTION WAS BEYOND REFEREE'S JURISDICTION

Neither in the court below nor in its brief here has the petitioner cited any case wherein the situation was analogous to the case at bar, in which a referee asserted any such summary jurisdiction as the petitioner contends for here, or in which any court ever sustained its exercise. We venture to say that the proposition is so fundamentally unsound and contrary to the accepted usage and practice of courts of bankruptcy that it was never before seriously put forward.

It is conceded that the trustee could not have maintained an independent action, either summary or plenary, against the respondent in the bankruptcy court or in any other Nebraska court either state or federal, respecting the matters set up by him in his attempted cross-action in the reclamation proceedings. The respondent had neither situs, agency, nor property within the territorial jurisdiction of any such court, and a summary order to show cause issued by the referee, or other court process, could not have been served upon it. The respondent came into the bankruptcy court for only one purpose, namely, to reclaim certain specified bonds; it tendered

only the issue as to the title and right to possession of these bonds. It did not thereby submit itself to the summary jurisdiction of the referee as to any other matter or claim in dispute between it and the bankrupt estate having no bearing upon the title or right to possession of these bonds. It did not, by filing its petition for reclamation, indicate or evince its consent that the referee should hear or adjudicate any such unrelated matter or claim.

The trustee's attempted cross-action, set up in his answer, is in its nature unsuitable to and out of place in the reclamation proceeding. The latter is in rem, in effect a replevin action; the cross-action is in personam, and is further inappropriate for the reason that it calls for relief which the referee is not empowered to grant. The petition for reclamation prayed that certain bonds be returned to the respondent as the owner thereof. The trustee prayed that reclamation be denied, and, in addition, that the respondent be required to pay a large sum to the trustee. It is the universal rule that where claims are filed with the referee against a bankrupt estate, the referee is without power to enter a judgment against the claimant for an amount in excess of the claim. He may consider offsets in favor of the estate only to the extent of reducing or extinguishing the claim, but for any excess the trustee must resort to a plenary action. The rule is stated in *Remington on Bankruptcy*, §1471, as follows:

> "Likewise, there may be no judgment in the bankruptcy proceedings against the claimant where the estate's offset exceeds the creditor's claim. The trustee must seek his remedy by plenary action."

This rule is supported also by the following cases:

In Re Continental Producing Co., 261 Fed. 627;

In Re Peacock, 178 Fed. 851;

Fitch v. Richardson, 147 Fed. 196.

We perceive no difference in principle, on this proposition, between the ordinary claim for a debt filed against the estate and a claim for the recovery of specific personal property. Both are summary proceedings. The claim for debt, if allowed, is payable out of the property of the estate after it is reduced to money, either as a preferred claim payable in full, or a general claim payable pro rata. The claim for specific personal property in a reclamation proceeding, if allowed, operates to withdraw the property concerned from the corpus of the estate. The effect in both instances is relatively the same. There is no more reason why the referee should be permitted to enter an excess money judgment against the claimant in reclamation proceedings than against the claimant for a debt.

III.

RESPONDENT DID NOT CONSENT

The respondent appeared in the bankruptcy court only for the purpose of reclaiming the bonds described in its petition, which tendered no issue other than the title to the bonds. Its appearance for that specific purpose cannot be construed to be a general appearance for all purposes. It was still a New York corporation, entitled to be sued there by the trustee as to every matter not within the legitimate and proper scope of the reclamation proceedings. By submitting itself to the jurisdiction of

the bankruptcy court in asking to reclaim the bonds, the respondent became subject only to such defenses as the trustee could properly assert in such proceedings.

By filing its petition for reclamation, the respondent did not consent that any other matters in controversy or affirmative claims or causes of action should be heard or adjudicated by the referee. It objected to that part of the trustee's answer which sought to bring in such extraneous issues, and moved to strike it out. When the referee refused, the respondent filed a written dismissal of its petition and withdrew from the hearing. Nothing more emphatic could have been done than was done by counsel for the respondent to make clear that it did not consent to the wrongful assumption of jurisdiction by the referee, but, on the contrary, was protesting against it. (Printed Record, pp. 9, 10, 19, 30.

IV.

DISCUSSION OF AUTHORITIES CITED BY PETITIONER

In their reasons relied upon for allowance of the writ (petition, p. 9), counsel assert that the decision of the Circuit Court of Appeals in the case at bar is in conflict with *Operators' Piano Co. v. First Wisconsin Trust Co.*, 283 Fed. 904, decided by the Circuit Court of Appeals for the Seventh Circuit. In that case Operators' Piano Company secured certain pianos from the bankrupt after adjudication, and the trustee brought suit against the company for their value. This suit was not commenced in the bankruptcy court, which was in Wisconsin, but in the United States district court in Illinois, which had jurisdiction of Operators' Piano Company by virtue of

the fact that the latter company was a citizen of Illinois, while the trustee was a citizen of Wisconsin, and the amount involved was alleged to be in excess of $3,000. It was a plenary action by the trustee against a party alleged to have wrongfully obtained property belonging to the bankrupt estate, instituted in a court within whose jurisdiction the defendant resided, and having jurisdiction by reason of diversity of citizenship and amount involved. The situation was altogether dissimilar to that presented in the case at bar.

The Operators' Piano Company objected to the jurisdiction of the Illinois federal court on the ground that the amount involved was less than $3,000, that therefore diversity of citizenship did not confer jurisdiction, that the suit was of such a nature as to require the consent of the defendant before it could be maintained against it (relying upon §23b of the Bankruptcy Act), and that it had never consented. The Circuit Court of Appeals held, in substance, that the trustee had the right to bring suit to recover the value of the pianos in the Illinois federal court, provided the usual conditions governing jurisdiction based on diversity of citizenship were shown to exist, and that they did exist in the Operators' Piano Company case, affirming the judgment of the court below.

In arguing to that conclusion, the court in the opinion pointed out the distinction between the case before it and a hypothetical case where the Operators' Piano Company might have come into the bankruptcy court and submitted itself to its jurisdiction, either by itself asking for relief, or by appearing therein and joining issue on the merits, thereby expressly or impliedly consenting to the

exercise of summary jurisdiction by the bankruptcy court. In that case, the court said, the adverse claimant "opens the door to such defenses as the trustee in bankruptcy possesses, and all such issues and all such defenses (including affirmative claims) may be properly litigated in the summary proceeding."

We call attention, first, to the fact that the court's comment was purely argumentative, and applicable only in an argumentative sense to the case before it, which had nothing to do with the summary jurisdiction of the bankruptcy court, and in which neither the trustee nor the Operators' Piano Company had sought to invoke that jurisdiction. It was not as if the trustee had served Operators' Piano Company with an order to show cause before the referee why it should not return the pianos or pay their value, and the Company had appeared and answered to the merits; it was not as if Operators' Piano Company had filed a petition with the referee praying for possession of the pianos. Neither was it a case in which Operators' Piano Company had filed its petition to reclaim pianos from the possession of the trustee, and the trustee in his answer, in addition to a denial of the company's title to and right of possession of the pianos, had attempted to set up a cross-action in no way related thereto, and not a defense or counterclaim to the company's claim respecting the pianos.

The expressions of the court in the opinion in the Operators' Piano Company case relative to summary jurisdiction are in the nature of obiter dictum, not being necessary to the decision in that case, but those expressions are not in conflict with the decision of the Circuit

Court of Appeals in the case at bar. In the Operators' Piano Company case the court did not say that the trustee, in his answer to a reclamation petition, could set up an entirely distinct cause of action not related to the subject of the reclamation proceeding, or that a party filing a petition to reclaim specific personal property in the possession of the trustee thereby consented that the referee should adjudicate accounts and rights to money or choses in action not in the trustee's possession but far removed from the territorial or physical jurisdiction of the bankruptcy court, and of such a nature as to require adjudication by a court endowed with plenary powers and jurisdiction.

Petitioner relies also upon *In re Carl Dernburg & Son*, 5 F. (2nd) 37, in which Emma Dernburg had guaranteed the payment of bankrupt's promissory note for $15,000, and, upon his failure to pay it, took up the note and filed claim for it in the bankruptcy court. The trustee filed objections alleging that the petitioner had received cash, notes and accounts aggregating $3,777.60, in the nature of voidable preferences, which she had failed to surrender, and praying that the claim be disallowed or reduced. The court held that, by filing the claim the claimant consented to the jurisdiction of the bankruptcy court to consider any defenses lawfully interposed, and that it had jurisdiction to pass on the question of voidable preferences. This ruling is in consonance with the ordinary practice as to claims filed in bankruptcy. As pointed out in the preceding portion of this brief (pp. 5, 6), the referee has power to consider offsets to claims filed to the extent of reducing or extinguishing

them, but not to deal with or render judgment for any excess beyond the amount of the claim.

Remington on Bankruptcy, §1471.

The Dernburg case is not in conflict with the decision in the case at bar.

The petitioner contends also that the decision of the court below is "in a way probably in conflict" with *Robertson v. Howard,* 229 U. S. 254. In that case the bankruptcy proceedings were in the federal court in Illinois. Among the bankrupt's assets were certain certificates of purchase from the state of Kansas to tracts of school land in that state which the bankrupt turned over to the trustees, who advertised and sold them in Illinois, and executed to the purchasers assignments of all the right, title and interest of the bankrupt in the land. The title of these purchasers was afterwards assailed in the Kansas courts by other parties claiming title to the land on the ground that the bankruptcy court was without power to convey title to land in Kansas by its sale in Illinois. The supreme court of Kansas held the sale void, but its decision was reversed, on writ of error, by this court. Without enlarging further upon the facts and issues in that case, we submit that it has not the most remote application to the facts and issues in the case at bar, and is, in no sense, in conflict with the decision therein. This court, in *Robertson v. Howard,* supra, held merely that the referee had power, by a sale in the territorial jurisdiction of his bankruptcy court, to convey the bankrupt's title to land in another state, without resorting to ancillary proceedings in the state where the land was situated.

In addition to the foregoing alleged grounds upon which he seeks the allowance of a writ of certiorari, the petitioner contends that the reclamation proceedings before the referee, and the trustee's alleged right to maintain a cross-action as to unrelated matters therein, are governed by the general equity rules prescribed for the federal courts on their equity side. Counsel cite numerous authorities (Brief, pp. 29, 30) showing that General Order No. XXXVII, stating that the rules of equity practice shall be followed in proceedings in equity instituted to enforce and carry into effect the bankruptcy act, does not apply to administrative proceedings before the referee but only to suits and proceedings brought in the federal courts in aid of bankruptcy proceedings.

In the opinion of the court below (Printed Record, p. 48) the same principle is adhered to, and the court quotes from *Weidhorn v. Levy*, 253 U. S. 268, to the effect that the jurisdiction of the referee cannot be extended to include jurisdiction over an independent and plenary suit, but is limited to ordinary administrative proceedings "and such controversial matters as arise therein and are in effect a part thereof." The attitude of the petitioner here is not that the decision of the Circuit Court of Appeals in the instant case is out of harmony with any of these decisions, but that they should all be set aside and disregarded because he is right and they are wrong.

These decisions, to the effect that the general equity rules do not apply to summary proceedings before the referee in bankruptcy, are founded upon common sense and sound logic. If they did apply, then proceedings before the referee, which were intended to be summary

in character and limited in scope, would be so amplified and extended as to convert the bankruptcy court into a court of chancery, with all its varied powers and functions. We submit that no good reason has been shown why the decision of the court below should be reviewed with respect to this sound and salutary ruling.

V.

CONCLUSION

When the trustee's answer containing the paragraph attempting to set up a cross-action was filed, and the matter came up before the referee on the respondent's motion to strike out that part of the answer, it must have then and there been apparent to him that the paragraph in question had no relation to the title or right to possession of the bonds which the respondent was seeking to reclaim, and that it was, in substance, a suit for a balance of money claimed by the trustee to be due on account, in other words, for a debt or for money not in the trustee's possession. Under such circumstances, since the attempted cross-action related to a mere debt and not to property in the possession of the trustee, the referee was without jurisdiction to adjudicate the matter, and the respondent could not be brought into the bankruptcy court with respect to it, but was entitled to be heard in a plenary action.

Remington on Bankruptcy, §2350, Vol. 5, p. 410 (as modified by Supp. Sept. 1930, p. 119).

Priest v. Weaver (C. C. A.), 43 F. (2nd) 57.

Fort Dearborn Trust & Savings Bank v. Smalley (C. C. A.), 298 Fed. 45.

Johnston v. Spencer (C. C. A.), 195 Fed. 215.

Shea v. Lewis (C. C. A.), 206 Fed. 877.

In Re Uittenbogard (C. C. A.), 295 Fed. 778.

No good grounds appearing for the interposition of this court, we respectfully pray that the petition for a writ of certiorari be denied.

WILLIAM C. DORSEY,

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Counsel for Respondent.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1931.

No. 179.

HERBERT S. DANIEL, Trustee of Peters Trust Company, Bankrupt,

Petitioner,

against

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

JOHN W. DAVIS,
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CHARLES POLETTI,
Counsel for Respondent.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1931.

No. 179.

HERBERT S. DANIEL, Trustee of Peters Trust Company, Bankrupt,
Petitioner,

against

GUARANTY TRUST COMPANY OF NEW YORK,
Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

Introductory.

This case arises out of the order of a referee in bankruptcy (R. 19), directing the respondent, Guaranty Trust Company, forthwith to pay to the petitioner, trustee in bankruptcy, the sum of $23,724.60. The District Court, on petition for review, affirmed this order (R. 28). The Circuit Court of Appeals reversed the District Court (R. 42); and this Court, on October 19, 1931, granted a writ of certiorari.

No opinion was rendered by the referee or by the District Court. The opinion of the Circuit Court of Appeals is re-

ported in 49 F. (2d) 866, and appears at R. 37-42. Jurisdiction is invoked under § 240a of the Judicial Code (U. S. Code, T. 28, § 347).

Statement of the Case.

On November 25, 1929, Peters Trust Company of Omaha, Nebraska, was declared insolvent and was placed in liquidation by a consent decree in the state court. On November 27 an involuntary petition in bankruptcy was filed in the Federal Court, and on December 10 (apparently prior to any action on the involuntary petition) Peters Trust Company filed a voluntary petition in bankruptcy and was adjudicated bankrupt. On the same day Herbert S. Daniel, the petitioner, was appointed receiver; and on March 17, 1930, he became trustee.

Immediately prior to the state insolvency proceedings, Peters Trust Company had ordered four consignments of bonds from the Guaranty Company of New York. These bonds were shipped to Peters Trust Company between November 20 and 23, the last two consignments not being delivered until after the state liquidating agent had assumed control (R. 5). The purchase price due on the bonds was $23,055.82 (R. 5).

On November 27, 1929, the Guaranty Company assigned its claim to the bonds to the Guaranty Trust Company, a banking corporation organized under the laws of New York, located in New York City, and having no place of business or agent in the State of Nebraska. The Guaranty Trust Company at that time had two accounts of the Peters Trust Company. The first was an open checking account, in which Peters Trust Company on November 25 had a credit balance of $31,046.53. The second was a demand loan account for money advanced to Peters Trust Company, in which on November 25th there was a debit balance of $156,700.

Pursuant to a collateral pledge agreement (R. 9) and in the exercise of its common-law right to a banker's lien, the Guaranty Trust Company on November 25, 1929, applied the credit balance in the checking account against the debit balance in the demand loan account (R. 18, 41). Its right to do this is not disputed by the petitioner. Subsequently, after taking over the claim of the Guaranty Company for the bonds shipped, the Guaranty Trust Company debited the demand loan account with the price of those bonds, $23,055.82 (R. 18-19).

At this point it may be well to explain in some detail the nature of this demand loan account, a statement of which appears at R. 18. At various times prior to November 25, 1929, Peters Trust Company had made a number of farm loans, secured by mortgages, which it intended to sell to Prudential Insurance Company, and had deposited with the Guaranty Trust Company the notes and mortgages representing those loans. The Guaranty Trust Company, against the deposit of those notes and mortgages as collateral, had advanced the full amount to Peters Trust Company, the total of these advances amounting on November 25th to the sum of $156,700., already mentioned.

As the loans were thereafter approved and accepted by Prudential Insurance Company, the amount of each loan, with accrued interest, was paid to the Guaranty Trust Company and credited to Peters Trust Company in the demand loan account—in other words, the account was gradually reduced by successive applications of portions of the collateral (the deposited mortgages) against the loan. The successive steps in this process are shown by the statement appearing at R. 18-19, which we have paraphrased in the statement appearing as an Appendix to this brief (*infra*, p. 46).

These successive applications of collateral were for the most part made after the adjudication in bankruptcy. Their propriety is not disputed. The result was that eventually the collections on collateral, coupled with the application of

the credit balance in the checking account, sufficed to wipe out the indebtedness of Peters Trust Company, leaving an admitted balance of $7,783.56 due to its trustee in bankruptcy. Of this, $7,500. was paid to the trustee on April 14, 1930 (R. 12), and the balance, $283.56, was paid after the decision of the Circuit Court of Appeals.

On April 2, 1930, the Guaranty Trust Company filed in the bankruptcy court a petition for reclamation of the bonds shipped to Peters Trust Company just prior to its insolvency and at that time in the possession of the trustee. The grounds of this petition (R. 1) were, in substance, that the purchase price was to have been paid in cash immediately upon delivery, that the bonds had been fraudulently ordered at a time when Peters Trust Company was insolvent and was known to be so by its officers, that Peters Trust Company never intended to pay for them, and that title therefore never passed.

It might, perhaps, have been argued that the filing of this petition for reclamation was inconsistent with the action previously taken in debiting the purchase price of the bonds against the demand loan account—a point which the trustee promptly raised in paragraph IX of his answer (R. 7). But it is unnecessary in this case to consider how far that earlier debiting constituted an election of remedies which might bar the subsequent petition for reclamation, as the final decision turned upon an altogether different point.

The trustee's answer in the reclamation proceedings denied the allegations of fraud in the petition, alleged that the sale of the bonds had been on credit, and asserted that title had passed to the bankrupt. In paragraph 7 (R. 6) he alleged that a part of the bonds had been purchased to fill orders of particular customers of Peters Trust Company, who were entitled to receive them on completing their payments of the purchase price. By an amendment (R. 9) he added the separate defense already mentioned, based upon the doctrine of election of remedies, as follows:

"IX. The trustee further alleges that with full knowledge of all the facts alleged in the applicant's petition, the applicant ratified and confirmed the sale of the said securities by attempting to impress a lien on the funds belonging to the bankrupt estate on deposit with the applicant, and is estopped to now reclaim said securities from the undersigned trustee."

It is to be noted that thus far the answer of the trustee was confined to raising issues or defenses germane to the issues presented by the petition; and had this been all, no question would now arise. But by paragraph 8 of his answer (R. 6) the trustee went further and attempted to interject into the proceedings an entirely new issue, in no way related to the question of title to the bonds which respondent was seeking to reclaim, and attempted to set up, in summary proceedings before the referee, an affirmative counterclaim to the entire balance of the collateral, or the proceeds from the collateral, held by the Guaranty Trust Company, in the demand loan account in New York. This paragraph, which is the crux of the present case, is as follows:

"8. Your trustee further alleges, that the Guaranty Trust Company of New York, the petitioner and applicant herein, has in its possession, on deposit, approximately the sum of $31,224.60 which belongs to the bankrupt estate, and which was accumulated by the Receiver and Trustee of said bankrupt estate since the date it was adjudicated bankrupt. The trustee has made due demand upon the petitioners for delivery of the said money, but the Guaranty Trust Company of New York has refused to deliver the said funds or any part thereof, and should be required to account for all funds collected by it on behalf of the receiver or trustee of Peters Trust Company, Bankrupt, or the bankrupt estate, and be directed to deliver the same forthwith to Herbert S. Daniel, Trustee."

The prayer of the trustee's answer was that notice should be given to the individual purchasers of the bonds named in paragraph 7, that they be directed to present their claims to

the bonds, that the petition of respondent to reclaim the bonds be denied, and:

> "The trustee further prays for an order directing the Guaranty Trust Company of New York to account to him for all funds collected or now held by it belonging to the bankrupt estate, and be ordered to deliver the same [forthwith] to your trustee, and for such other relief as to the Court may seem just and equitable" (R. 7).

On April 25, 1930, the petition for reclamation came on for hearing before the referee. At this hearing counsel for the Guaranty Trust Company moved to strike from the trustee's answer paragraph 7 (relating to the claims of individual customers) and paragraph 8 (relating to the funds held by the Guaranty Trust Company in New York), on the ground that they raised separate and distinct issues, unrelated to the question raised in the reclamation petition, and that the referee had no jurisdiction to entertain them. This motion was overruled by the referee (R. 8-9).

Thereupon counsel for the Guaranty Trust Company immediately filed a dismissal of their reclamation proceeding, and withdrew from the hearing, saying (R. 9):

> "We will file a dismissal of this reclamation proceeding. In other words, from the very first our position has been that *it has been immaterial whether we keep the money in New York under the collateral pledge agreement,* or whether we get the bonds. Now if Mr. Daniel, the trustee, is allowed to come in here and in his answer bring up these different issues, and if these other people are allowed to come in this lawsuit, as far as we are concerned, why we will dismiss the action. Now of course there isn't any counterclaim, this isn't the same as a counterclaim because we are merely asking for the custody of the bonds. Mr. Daniel has no right to come in when we ask for the custody of the bonds, and bring up a new issue."

The referee allowed this dismissal, only so far as the original petition for reclamation was concerned (R. 10, 21), but

proceeded to adjudicate the questions raised by the trustee's answer, and proceeded to make findings as to the rights of the customers of Peters Trust Company to the bonds ordered from New York. Upon the basis of these findings he ordered (R. 21-22) that these customers should receive the various allotments of bonds "upon the payment by said respective persons to said Trustee of any sums which may be due from said respective persons to said bankrupt estate."

The propriety of this adjudication is not now disputed and is not involved in this case. But the referee did not stop there, or content himself with adjudicating the question of title to the bonds in the custody of the trustee, which was the sole question raised by the reclamation petition. Instead he proceeded, in the absence of counsel for the Guaranty Trust Company, and against their protest, to hear and determine the claim of the trustee to recover the funds held by the Guaranty Trust Company in New York,—i.e., the proceeds of the collateral in the demand loan account, to which Guaranty Trust Company, under a collateral pledge agreement (R. 9), and under its common-law rights, claimed a set-off or banker's lien (R. 19-41). With respect to this he made the following finding (R. 21-22):

> "And the court further finds that the Guaranty Trust Company has in its hands the sum of $23,724.60 in cash, belonging to Herbert S. Daniel, trustee of the above named bankrupt; that the said sum was accumulated by Herbert S. Daniel as receiver subsequent to February 12th, 1930, said moneys having been collected by said Guaranty Trust Company for and on behalf of said bankrupt estate from the Prudential Insurance Company of America on mortgages made by the bankrupt and sold to the Prudential Insurance Company of America, and *that said Guaranty Trust Company has not made herein any claim to the said fund of $23,724.60, and has no claim to the said fund,* or to any part thereof, and is merely holding the said sum of $23,724.60 as custodian and agent of Herbert S. Daniel, as trustee of the above named bankrupt, and that said sum should be delivered forthwith to said trustee."

Upon these findings the referee entered a summary turnover order, amounting in substance to an affirmative money judgment, in the following terms (R. 22):

> "And It Is Further Ordered That the Guaranty Trust Company of New York, the applicant herein, be, and it is hereby *ordered and directed to forthwith pay over to Herbert S. Daniel*, as trustee of the above bankrupt estate, the sum of $23,724.60, of moneys in the hands of said Guaranty Trust Company of New York, belonging to Herbert S. Daniel, trustee of said bankrupt estate, *with interest thereon at the rate of 7 per cent per annum from this date.*" (Italics ours.)

The Guaranty Trust Company prosecuted a petition for review of this portion of the order to the District Court at Omaha, which affirmed the order after striking out the provision as to payment of interest (R. 26). From this affirmance the Guaranty Trust Company appealed to the Circuit Court of Appeals.

Among the assignments of error were included the absence of jurisdiction in the referee to determine a counterclaim wholly unrelated to the original petition, and the fact that the referee's order was erroneous and void:

> "* * * for the reason that said Guaranty Trust Company was, on the face of the record, in possession of said money outside of and beyond the territorial jurisdiction of said bankruptcy court, *and was and is an adverse claimant thereof entitled to its day in court in a plenary action in some court having jurisdiction of its person and of the said funds in its possession*" (R. 33). (Italics ours.)

The Circuit Court of Appeals unanimously reversed the District Court and held that the referee had no jurisdiction to make the order complained of. The present petition for certiorari brings up the propriety of this reversal.

Question Presented.

The question presented to this Court is: Did the respondent, by filing with the referee a petition for reclamation of certain specific property in the possession of the trustee in bankruptcy, thereby submit to the summary jurisdiction of the referee for all purposes, so as to enable the referee to entertain and adjudicate a counterclaim wholly unrelated to the petition for reclamation, and to enter an order giving summary judgment for a sum of money adversely claimed by respondent, outside the territorial jurisdiction of the bankruptcy court?

Summary of Argument.

The trustee contends that the filing of the petition for reclamation (the only affirmative step taken by respondent) amounted to a general submission for all purposes to the summary jurisdiction of the referee, and opened the door to an adjudication by the referee of claims by the trustee (wholly unrelated to the reclamation proceeding) which could otherwise have been tried only in a plenary suit. It is our contention, and the Circuit Court of Appeals has held, that the filing of such a petition has no such effect, that the referee was without jurisdiction to proceed, over the protest of respondent, to adjudicate, in a summary manner, the claim of the trustee, and that the trustee should be left to his proper remedy by plenary suit.

We accordingly urge, in the first place, that the referee had no jurisdiction to entertain the trustee's counterclaim in the first instance, since it appeared on the face of the pleadings that it had nothing to do with the subject-matter of the reclamation proceeding, and that he should have granted our motion to strike out that counterclaim (*infra*, pp. 10-23).

In the second place, assuming that the referee could properly proceed to investigate the merits of the counterclaim,

we urge that he should nevertheless have subsequently declined jurisdiction when it appeared that the subject-matter of the counterclaim was not a *res*, or an admitted bank deposit, forming part of the bankrupt estate, but was a mere debt (*infra*, pp. 23-27). Related to this contention, but distinct from it, is our third point, that the referee (assuming he had jurisdiction in the first instance) was bound to decline jurisdiction when it appeared, as is shown by the record, that respondent had a *bona fide* claim of right, which was not fictitious or colorable, to the set-off claimed (*infra*, pp. 28-40).

Finally, we submit that even if it be assumed that the referee had jurisdiction to proceed, he exceeded his authority in entering what amounts to an affirmative money judgment against the respondent (*infra*, pp. 41-43).

I.

The referee erred in overruling respondent's motion to strike paragraph 8 from the trustee's answer. Irrespective of whether respondent had an adverse interest in the balance of the demand loan account claimed by the trustee, the referee had no jurisdiction to entertain such a counterclaim.

A referee in bankruptcy is not in any sense a separate court, nor is he endowed with any independent judicial authority. He is merely an officer of the court of bankruptcy, having no power except as conferred by the order of reference or by the Act.

Weidhorn v. *Levy*, 253 U. S. 268, 271.

The reclamation proceeding brought by the respondent was, in effect, a proceeding in *rem*, partaking, except for its

summary character, of the legal aspects of an action in replevin. Such a proceeding is directed against property in the possession of the trustee in bankruptcy. To regain such property, a claimant must affirmatively establish his own right to possession by proving ownership absolute or qualified.

> *General Phonograph Corp.* v. *Fanning,* 6 F. (2d) 115 (C. C. A. 3rd, 1925).

It is not, however, our contention, as stated at pages 73-74 of petitioner's brief, that a proceeding for reclamation of property in the possession of the trustee is to be treated as an action at law for all purposes. It is a proceeding *sui generis,* of a summary nature.

A reclamation proceeding in bankruptcy can only be brought in the bankruptcy court at the domicile of the bankrupt, that is, the bankruptcy court having primary jurisdiction. The respondent in this case could not have instituted legal proceedings in any other court, nor could it have resorted to any other methods of obtaining possession of the bonds held by the trustee.

> *Hebert* v. *Crawford,* 228 U. S. 204;
> *Murphy* v. *John Hofman Co.,* 211 U. S. 562;
> *White* v. *Schloerb,* 178 U. S. 542.

See also *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U. S. 734, and *Remington on Bankruptcy,* Vol. 5, Secs. 2450 and 2352. This restriction and limitation on the respondent's choice of a forum is admitted at page 49 of petitioner's brief.

A consideration of the facts indisputably shows that the claim asserted by the trustee in paragraph 8 of his answer (R. 6) was in no way germane to the issues raised by the petition for reclamation of the bonds sold by respondent to the bankrupt. The account, to the balance of which the trustee asserted his claim, was a demand loan account, secured by the deposit by the bankrupt of certain mortgages

as collateral. Advances were made by respondent on that collateral. Payments made to respondent by the Prudential Insurance Company were, in turn, credited to the bankrupt in that account.

The Circuit Court of Appeals, in its opinion, stated:

> "The two proceedings were quite distinct. Appellant sought to recover certain bonds to which it claimed title. The trustee sought an order that appellant should pay over money of the bankrupt estate received by appellant, after bankruptcy. The proceedings would not have been more unrelated to each other if the trustee had sought an order on appellant for the delivery of books and papers such as was asked in *Babbitt* v. *Dutcher*, 216 U. S. 102, or an order for the examination of witnesses such as was asked in *Elkus, Petitioner*, 216 U. S. 115" (R. 42).

But the trustee, in his brief, contends that the respondent, by presenting a petition for reclamation of the bonds, appeared generally and submitted itself for all purposes to the summary jurisdiction of the referee (Petitioner's Brief, pp. 15, 19). We admit that the respondent submitted itself to the jurisdiction of the referee to determine any issues relating to the title to the bonds sought by it. We also admit that the respondent, by withdrawing its petition for reclamation, could not deprive the referee of whatever jurisdiction he might have obtained by virtue of the presentation of the petition. We therefore do not dispute the statement at page 59 of petitioner's brief that "respondent's withdrawal after the issues had been made up and the hearing entered upon did not defeat the jurisdiction, previously attached, to determine the issue raised by the answer of the trustee." We merely contend that jurisdiction such as to permit the referee to pass upon the affirmative and unrelated counterclaim included in the trustee's answer never "previously attached". Such jurisdiction was not "destroyed" or "defeated," for the reason that it never existed.

This is the sole issue presented upon this appeal. With respect to it the Circuit Court of Appeals stated:

> "We have been cited to no authority for the proposition that a creditor or other petitioner asking specific relief against a bankrupt's estate, as provided by the Bankruptcy Act, thereby becomes subject to summary orders by the referee in matters entirely disconnected from the subject matter of such claim or petition, and no such authority is believed to exist. Under the circumstances we think that the appellant's objections to the jurisdiction should have been sustained and the order of the court affirming the order of the referee will be *Reversed*" (R. 42).

In the absence of decided cases on this specific issue, the petitioner contends that such jurisdiction is derived from General Order XXXVII and Federal Equity Rule 30. According to the petitioner, General Order XXXVII makes all the rules of equity practice established by the Supreme Court of the United States applicable and determinative in a summary proceeding before a referee on a petition for reclamation. As a consequence petitioner argues that the trustee could take advantage of Equity Rule 30, which permits an answer to set up, without cross bill, any set off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, regardless of whether or not it is related to, or arises out of, the matters stated in the bill of complaint.

General Order XXXVII, the cornerstone of the petitioner's argument, provides:

> "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for

return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing."

A reading of this order clearly indicates that this Court did not have in mind summary proceedings *before a referee*. In the first place, throughout the General Orders this Court refers to proceedings in bankruptcy either by the word "proceedings" or "bankruptcy proceedings". See, for instance, General Order XII, which prescribes the duties of a referee. Secondly, proceedings in bankruptcy before a referee are *sui generis;* they are neither "proceedings in equity" nor "proceedings at law". In the third place, it is a strained construction to consider summary proceedings as proceedings "instituted for the purpose of carrying into effect the provisions of the act". And if one adopts the statement of the petitioner in the case at bar that summary proceedings before a referee at all times partake of the nature of equity proceedings and that General Order XXXVII is applicable to them, what is the significance of the phrase "*proceedings at law*"? It should be noted, moreover, that Order XXXVII provides that—

> "the *judge* may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication."

In short, it is manifest that since the General Orders deal largely with the regulation of summary bankruptcy proceedings, this Court would not then provide that the general equity rules should be applicable, many of the provisions of which would be not only at variance with the purposes and language of the Bankruptcy Act and the General Orders but impossible of application. Because bankruptcy proceedings are *sui generis*, this Court simply desired to make it certain that plenary suits dealing with bankruptcy shall be guided by the ordinary rules rather than by any provisions in the General Orders.

But this question is no longer *de novo*. Courts have frequently and uniformly held that General Order XXXVII is not applicable to a summary proceeding.

In re Cunney, 225 Fed. 426 (D. C. Mass. 1904);
International Harvester Co. v. *Carlson*, 217 Fed. 736, 739 (C. C. A. 8th, 1914);
In re Hughes, 262 Fed. 500 (C. C. A. 2d, 1919);
Bradley v. *Huntington*, 277 Fed. 948 (C. C. A. 2d, 1921);
In re Kenney & Greenwood, 23 F. (2d) 681 (1928, D. C. Me.).

In *In re Cunney, supra*, at page 428, the District Court stated:

"It was not denied that the conduct of the bankrupts was indefensible, but it was urged that they have not the money now in their hands, and that they did not have it when the trustee filed his petition asking that they turn over the money to him. The bankrupt's counsel contended that by reason of General Order XXXVII (89 Fed. xiv, 32 C. C. A. xi) the statements made by the bankrupts in their sworn answer to this petition must be taken as true, unless controlled by the testimony of two witnesses, or by that of one witness with corroborating circumstances. This contention is without force in the case at bar. General Order XXXVII applies only to equity proceedings, properly so called, and not to summary proceedings in bankruptcy like this. Even in summary proceedings the court allows the respondent full opportunity for hearing and defense, but it is not limited by the technical rules of procedure in equity."

And in *International Harvester Co.* v. *Carlson, supra*, at page 739, the Circuit Court of Appeals for the Eighth Circuit said:

"Counsel for the objecting creditor insists that rule 37 of the bankruptcy rules makes the general equity rules prescribed by the Supreme Court applicable to proceedings in bankruptcy, and that by equity rule 66 (198

Fed. xxxvii, 115 C. C. A. xxxvii) the time for filing exceptions to the report of masters is fixed at 20 days. *We do not think that the general equity rules can be applied as rules of court in the performance of the administrative work of courts of bankruptcy. They may be looked to for analogies, but not as rules. The Supreme Court itself has fixed the rules to govern courts of bankruptcy.* To hold that the District Court was bound by the report of the referee, because exceptions were not filed within 20 days, would deprive that court of its duty both under the bankruptcy law and the rules of the Supreme Court to pass upon the question of the bankrupt's right to his discharge." (Italics ours.)

Remington on Bankruptcy, in Vol. 1, Sec. 31, states:

> "This General Order has been construed to refer only to suits and proceedings other than the proceedings in bankruptcy themselves, in other words to suits and proceedings brought in the Federal Courts in aid of bankruptcy proceedings; as, for example, suits in equity or at law to recover preferences, set aside fraudulent transfers, etc., even though this General Order was prescribed at a time when the Federal Courts had no jurisdiction of bankruptcy suits per se but only of suits where diversity of citizenship might exist as in other Federal cases."

The Circuit Court of Appeals, in its opinion in the case at bar, likewise concluded that General Order XXXVII is not applicable to summary proceedings (R. 41). Citing and quoting from *Weidhorn* v. *Levy*, 253 U. S. 268, the Court pointed out that in the provisions of the General Orders summary proceedings are referred to by the word "proceedings" and never by the words "proceedings in equity" and "proceedings at law" (R. 41).

But despite all this the "petitioner maintains that General Order XXXVII does not admit of such interpretation" (Br. p. 39).

Consequently, if the provisions of General Order XXXVII are not applicable to summary proceedings, the provisions of Equity Rule 30 may be disregarded. Nor is there need to consider here the soundness of the construction by some

courts that even the broad language of Equity Rule 30 does not allow a cause of action to be pleaded as a counterclaim if it could not have been made the subject of a cross bill prior to the adoption of the rule. On this point we admit the argument presented by the petitioner at pages 41 to 46 of his brief.

Recognizing perhaps the weakness of his contention that General Order XXXVII is applicable to the summary jurisdiction of the referee in this case, the petitioner argues that apart from General Order XXXVII and Equity Rule 30 a referee in bankruptcy should on general principles be given jurisdiction in a reclamation proceeding to pass on any and all counterclaims interposed by the trustee, whether these are related or unrelated to the subject matter of the petition for reclamation (Petitioner's Brief, pp. 46, *et seq.*). We submit, however, that there is no public policy that demands such a limitless extension of the power of a referee in bankruptcy, particularly in view of the fact that respondent, if it desired to assert its right to the possession of the bonds claimed, had no choice save to appear before the referee of the bankruptcy court having primary jurisdiction.

In fact, what would be the effect of a rule such as that urged by the petitioner? To hold that a person who believes he has title to property in the possession of a trustee in bankruptcy and who files a petition for its reclamation (the only remedy available to him), must thereby submit all his dealings with the bankrupt to the summary jurisdiction of the referee and must forego all rights granted him by law in a plenary suit, would result in the imposition of an unfair burden. It would require the claimant to choose between an abandonment of his right to recover the specific property held by the trustee and an abandonment of his right to have the trustee's independent claims against him adjudicated in a plenary suit. The choice thus forced upon him is more than a mere choice between different tribunals, such as any ordinary litigant must make when by filing suit he opens the door to counterclaims which would otherwise be triable in a different forum. It is a choice, not between tribunals,

but between the ordinary process of law in a plenary suit and the summary process of a referee's hearing. Petitioner has cited no authority, and the Circuit Court of Appeals found none, to support the contention that such a choice should be imposed upon persons having dealings with a bankrupt estate. Obviously, in requiring plenary suits in certain cases, Congress in the enactment of the Bankruptcy Act and the courts in its application have considered the rights of a party in a plenary action as of some consequence, even though such plenary actions may occasionally delay complete administration of the bankrupt estate. Speed in administration is not the sole consideration, as one is led to believe from petitioner's argument (Br., p. 60). *Cf. In re Lummus*, 214 Fed. 891.

The petitioner, in arguing that the referee had jurisdiction of the counterclaim presented in paragraph 8 of the trustee's answer, states on page 56 of his brief that "equitable terms may be imposed by a court *as a condition of granting an order of reclamation*". We may concede the soundness of this principle; but we submit it is not applicable to the case at bar. We likewise admit the statement at page 62 of petitioner's brief that:

> "Courts of bankruptcy in exercise of their equity powers act *in personam* and have summary jurisdiction where a party voluntarily appears or can be served with process, regardless of the location of the *res* or domicile of the party."

But this statement presumes that the respondent voluntarily appeared to adjudicate not only its own claim to the bonds, but also the counterclaim presented in the answer of the trustee, or that the respondent could have been served with process within the jurisdiction of the bankruptcy court. The record shows that neither of these facts is true in the case at bar.

In further support of his argument that the referee had jurisdiction to pass on the counterclaim asserted by the trustee, petitioner states in the heading at page 50 of his brief:

"The appellant, by coming into the Bankruptcy Court and seeking affirmative summary relief, thereby gave the court jurisdiction of its person, as to such issue, and all such defenses, including affirmative claims, that may be properly litigated in that summary proceedings. Consent thus given cannot be withdrawn so as to deprive the court of jurisdiction so obtained."

And the petitioner cites in his brief, at pages 50 to 55, the following decisions as substantiating this heading:

Operators Piano Co. v. *First Wisconsin Trust Co.*, 283 Fed. 904 (C. C. A. 7th, 1922);
In re Bennett, 285 Fed. 351 (C. C. A. 7th, 1922);
In re Pennsylvania Coffee Co., 8 F. (2d) 98 (D. C. W. D. Penn., 1925);
Triangle Electric Co. v. *Foutch*, 40 F. (2d) 353 (C. C. A. 8th, 1930);
In re Dernburg & Son, Inc., 5 F. (2d) 37 (C. C. A. 2nd, 1924);
In re Barnett, 12 F. (2d) 73 (C. C. A. 7th, 1926).

The petitioner relies heavily upon *Operators Piano Co.* v. *First Wisconsin Trust Co., supra.* This case, however, is not in point. To begin with, the decision involved jurisdiction of a District Court over a plenary suit under Section 23b of the Bankruptcy Act. No summary proceeding was involved. The extract from the opinion quoted at pages 50 and 51 of petitioner's brief is pure dictum. It is clear from the broad general language used by the Court in its opinion that it did not intend to cover a situation such as that at bar. It should be noted, moreover, that the Court uses the phrase "affirmative claims" only as connected with a defense to a claim,—in other words, as something related to, and used to defeat, the claim of the petitioner for relief in the summary proceeding, not as something which may give rise to an independent affirmative judgment. Likewise, the use of the word "counterclaim" by the Court in this *dictum* implies a right grow-

ing out of the transaction for which the petitioner is seeking relief.

In *In re Bennett,* 285 Fed. 351, the sole question determined was the jurisdiction of the referee to settle, in a summary proceeding against the trustee and a company, a controversy over an interest in that company. The Court decided that the referee had no jurisdiction. It is apparent that the case has nothing to do with an unrelated counterclaim presented in a petition for reclamation of specific property.

The extract quoted at page 51 of petitioner's brief is purely argumentative. The presentation of the extract *in toto* destroys the value of the case for the contention of the petitioner. The Court in its opinion states (285 Fed. at p. 352):

> "We think the case comes within the holdings of the long list of cases that deny to the bankruptcy court authority to dispose of controverted issues of this character in a summary proceeding against the objection of the adverse party. Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; First Nat. Bank v. Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051.
>
> But two possible reasons can be suggested why this rule should not be invoked. It may have been contended that Collins' petition for leave to sue the trustee and to require him to appear in the New York court conferred jurisdiction on the bankruptcy court to dispose of the merits of this controversy. We have consistently upheld the jurisdiction of the bankruptcy court to determine controversies, either in summary or in plenary proceedings, where the adverse party either invokes the jurisdiction or consents to a trial of the disputed issues in such a proceeding. Operators' Piano Co. v. First Wisconsin Trust Co. (C. C. A.) 283 Fed. 904. And we may add that we think greater business efficiency and a more speedy administration of estates, together with greater uniformity in rulings, would be attained if all such controversies could, regardless of the objection of the ad-

verse party, be determined in the bankruptcy court; the court having jurisdiction to administer the bankrupt estate. *But such an end can only be secured by legislation. We must construe the law as it stands.*

Under the law as it exists, Collins had the right to litigate this question either in the state court or before the referee in bankruptcy. Against his objection, it could not be determined in summary proceeding by the referee." (Italics ours.)

In re Pennsylvania Coffee Co., 8 F. (2d) 98, also cited by petitioner, does not involve a summary proceeding in bankruptcy. The petition was filed as a plenary suit. The matter was merely referred to a referee *as special master* to take testimony and report the facts to the Court. Furthermore, it should be noted that the order of the Court to turn over certain moneys to the trustee was made on a new petition filed by the trustee and not in the original petition filed by the claimant against the trustee. But apart from the fact that a new petition was filed, the case in substance is simply an application of the principle that the Court has power to disallow a claim unless the claimant is willing to perform certain conditions imposed by the decree. In that case the claimant had received what constituted a preference under an assignment directly related to the subject matter of the original claim. This was the subject of the turnover order.

Similarly in *Triangle Electric Co.* v. *Foutch*, 40 F. (2d) 353, no petition for reclamation of specific property in a summary proceeding was involved. The case involved merely an ordinary proof of claim, to which the trustee interposed a counterclaim. Moreover, the counterclaim presented by the trustee was related to the original claim. In addition, the order of the referee was not an affirmative order unconditionally directing the claimant to return to the trustee the specific property which the trustee sought. The order merely states that:

"The claim should be allowed with the proviso, that, if the claimant shall, within a specified time, fixed by the

court, return to the trustee the car load of merchandise described and mentioned in the objections, or the cash value of the same, that then the claim should be allowed in full" (p. 354).

The direct question involved in *In re Dernburg & Son., Inc.*, 5 F. (2d) 37, was the jurisdiction of a referee in bankruptcy to inquire into defenses interposed by the trustee against claims of creditors who had received preferences or to whom conveyances, transfers, assignments or encumbrances, void or voidable under Section 67(e) had been made. Section 57(g) of the Bankruptcy Act specifically provides that such claims shall not be allowed unless the creditors shall surrender their preferences, conveyances, transfers, assignments or encumbrances. It is quite apparent that decisions of this nature do not strengthen the contention of the petitioner that the referee in the case at bar had jurisdiction of the counterclaim asserted in paragraph 8.

In *In re Barnett*, 12 F. (2) 73, the order of the referee was not an order granting affirmative relief such as that granted in the case at bar. In that case the referee allowed a claim filed against the estate on condition that the claimant turn over certain bonds in his possession belonging to the bankrupt. It is one thing for a referee, as a condition precedent to the granting of relief to a claimant in reclamation proceedings, to require the claimant to satisfy an outstanding demand of the trustee. It is an altogether different thing for a referee, by an absolute and unconditional order, to require a claimant, to whom no relief is granted, to satisfy "forthwith" an independent, and disputed, counterclaim. The cases cited by petitioner are authority only for the first of these propositions, with the soundness of which this Court need not now be concerned. Upon the second proposition (which is the one here involved) those cases are not in point.

In conclusion, it can be stated that the cases relied upon by the petitioner to substantiate the principle stated at page 50 of his brief are not applicable to our case. The opinion of the Circuit Court of Appeals need not be altered:

"We have been cited to no authority for the proposition that a creditor or other petitioner asking specific relief against a bankrupt's estate, as provided by the Bankruptcy Act, thereby becomes subject to summary orders by the referee in matters entirely disconnected from the subject matter of such claim or petition, and no such authority is believed to exist." (R. 42).

II.

Assuming that the referee did not err in overruling respondent's motion to strike out paragraph 8 of the trustee's answer, the referee should nevertheless have subsequently dismissed the counterclaim when it appeared that the subject matter of the counterclaim was not a specific *res*, or an admitted bank deposit, but was in effect merely an alleged debt.

The petitioner, we assume, will admit that unless the property involved is within the territorial jurisdiction of the bankruptcy court or the respondent is subject to its process, the referee has no jurisdiction. As to the former basis of jurisdiction, the petitioner presumably admits that the balance of the demand loan account, be it considered as a mere debt or as property in tangible form, has not its situs in Nebraska. And as to the latter basis of jurisdiction, it is not disputed that personal jurisdiction over the respondent could not have been obtained by any court in Nebraska, for the respondent was neither qualified to do business within the state nor did it have a place of business or agent therein. Hence, the only means for the referee to obtain jurisdiction over the respondent was by reason of its having filed a petition for reclamation of the bonds. This, we believe, the referee could not do.

But granting for the sake of argument that the referee did thereby obtain jurisdiction, he is nevertheless still sub-

ject to and restricted by the general limitations imposed by the Bankruptcy Act upon his summary jurisdiction.

The record in this case discloses that the sum for which the petitioner counterclaims arose as follows: Prior to the filing of the petition in bankruptcy, the respondent loaned to Peters Trust Company from time to time certain sums, receiving from it in return certain notes and mortgages as collateral. Exercising a privilege which the petitioner does not dispute, the respondent from time to time disposed of these notes and mortgages (as the Prudential Insurance Company took them up) and credited the proceeds to the Peters Trust demand loan account. Under its collateral pledge agreement respondent also credited to this account the amount standing with it on deposit in the checking account, with the result that the subsequent disposal by the respondent of such of the collateral notes and mortgages as remained in its hands when the petition in bankruptcy was filed ultimately created a balance in the petitioner's favor, the right to which balance, less a part payment thereon, is the present subject of dispute. This balance at no time formed a part of the checking account, and was never carried or regarded by the parties as a "deposit."

It is submitted that these facts lead to three conclusions:

(a) That the sum in dispute cannot be viewed as a bank deposit in the sense in which that term is used in the cases holding that for bankruptcy purposes a bank deposit is to be distinguished from an ordinary debt.

(b) That the admitted right of the respondent not only to dispose of the notes and mortgages, but to credit the proceeds against the loan account, negatives any contention that the respondent was under a duty to keep these funds separate and distinct or that principles of trust or agency may be applied.

(c) That the correct view of the transaction is that of a running account whose reduction to a balance has therefore placed the parties in a simple debtor-creditor relation.

This being so, the instant case is squarely within the rule that a referee in bankruptcy is without jurisdiction to entertain a summary proceeding for the collection of a debt, whether disputed or not, since even an admitted debt (and *a fortiori* a debt which is disputed) is not a *res* and cannot be made the subject of a summary turnover order. This rule is exemplified in the following cases:

In re Haley, 158 Fed. 74 (C. C. A., 6th, 1908), appeal dismissed 209 U. S. 546. Here the trustee of a bankrupt corporation sought to assert in summary proceedings liability for the corporation's debts against a stockholder of the corporation who had subscribed to its stock with knowledge of its fraudulent overvaluation. In denying jurisdiction, the Court said, at page 78:

> "A court of bankruptcy has no jurisdiction of a suit at law or in equity brought by a trustee to recover property *or collect debts,* or to set aside transfers of property alleged to be fraudulent, except by consent of the defendant."

In re Howe Manufacturing Company, 193 Fed. 524 (D. C., W. D., Ky., 1912). Speaking of a summary proceeding brought by the trustee of a bankrupt corporation to enforce liability for an unpaid stock subscription, the Court said at page 528:

> "If in a proceeding in bankruptcy proper the trustee could intrude a separate suit against every debtor of the bankrupt no difference what the demand might be, we should have a conglomeration of issues of the most remarkable extent and character in a bankruptcy proceeding. Nothing of the sort was contemplated by Congress, nor provided for by the act. On the contrary, the trustee, if he succeeds to the rights of the bankrupt, must do as the latter would have been compelled to do, and, if he have any claim to property or any right to recover upon any indebtedness alleged to be due from another person, he must, like every other litigant, institute his own separate and independent action in a court having jurisdiction of the subject-matter, and have his claim regularly adjudicated in due course of law. Being

a trustee in bankruptcy gives him no special privileges in the courts. He stands there like other people. These general propositions seem to admit of no doubt. There are cases, however, which are exceptional, and in them summary proceedings may be resorted to, for example, in cases where property is in the possession of the trustee and therefore in *custodia legis*. If that possession is interfered with, summary action is admissible, and where the bankrupt refuses, or some agent of his refuses, to deliver to the trustee property belonging to the estate, a similar course is open. But these exceptions do not embrace cases where there are adverse claims to the property made in good faith, *nor those in which there is an outstanding indebtedness of any character.* Nor do they embrace a case where a third person has the property in his possession claiming it adversely, nor a case where recovery on a contract is sought, for in respect to all such cases it cannot be said that the debtor is in 'possession' of any property of the estate within the rule as to summary proceedings." (Italics ours.)

In re Ballou, 215 Fed. 810 (D. C. E. D. Ky., 1914). Here the trustee in bankruptcy sought to enforce against a corporation the specific performance of its contract to pay the bankrupt in stock for services performed by him. Denying this right, the Court said at page 813:

> "I am, however, clear that the referee had no jurisdiction of the proceeding, and that it is not now too late to raise the question. This was not a case for a summary proceeding. A summary proceeding is proper only to effect the transfer of the physical possession of property from the bankrupt or a third person to the trustee. It is not proper to enforce the performance by a third person of a contract with the bankrupt. *An undisputed debt due the bankrupt cannot be collected by a summary proceeding* * * * No instance can be found, I dare say, where the payment of a debt due or the specific performance of a contract with the bankrupt has been enforced in any such way."

Remington supports this view when he says in his treatise on bankruptcy, in Vol. 5, Sec. 2350, as amended by his Supplement of September, 1930:

"The determination of the questions, first, as to whether or not the property is merely a debt, and, second, if not a mere debt, as to who has possession or control of it, determines the forum to which the parties must resort to work out their rights and the manner of procedure, as to whether summary or plenary.

"* * * or if the property does not exist in tangible form, but is a mere debt owed by a third party, then such third party need not come into the bankruptcy proceedings for his rights, and the trustee cannot bring him into the proceedings and he is entitled to be heard in plenary action."

An examination of the cases cited in petitioner's brief to deny the existence of this rule indicates that they are not applicable to the facts here. *May* v. *Henderson,* 268 U. S. 111 (1925), and *In re Davis,* 119 Fed. 950 (D. C., W. D., Tex., 1903), are inapplicable not only because they concern ordinary bank deposits rather than balances of running loan accounts, but because in each case the deposit was taken with notice of the fact that it was a fund specifically set aside for creditors.

Reed v. *Barnett National Bank,* 250 Fed. 983 (C. C. A., 5th, 1918), is similarly inapplicable in that it involved an ordinary bank deposit taken with knowledge of the depositor's insolvency.

Knapp & Spencer Co. v. *Drew,* 160 Fed. 413 (C. C. A., 8th, 1908), and *In re Walker Grain Co.,* 295 Fed. 120 (C. C. A. 5th, 1923), simply affirm the familiar rule that a summary proceeding will lie to compel the return of money accepted by a creditor with knowledge of his debtor's insolvency.

In re Radley Steel Const. Co., 212 Fed. 462 (D. C., E. D., N. Y., 1914), is inapplicable both because it deals only with a bank deposit and because the decision supports the respondent's contention that jurisdiction may be defeated by a bona fide adverse claim.

III.

Assuming that the counterclaim of the trustee is for property existing in tangible form, the referee is nevertheless bound to make inquiry as to whether the respondent has an adverse interest in such property. The record discloses that the respondent has an adverse interest which precluded the referee from proceeding further on the counterclaim.

If the counterclaim of the trustee relates to property existing in tangible form (which may be made the subject of a summary turnover order), the principles governing the jurisdiction of the referee are firmly fixed by adjudication. In short, if the possession, actual or constructive, of the property is in the bankrupt or his agent or in some one not claiming a beneficial interest in it, or is in the receiver, marshal or trustee in bankruptcy, the bankruptcy court has summary jurisdiction over it and may summarily order its surrender or delivery, may bring all parties claiming interests in it into court, and may determine all rights to it. If, on the other hand, some third party claiming a beneficial interest in the property has possession, the trustee cannot bring him into the bankruptcy proceedings. Such a party is entitled to be heard in a plenary action. See *Remington on Bankruptcy*, Vol. 5, Sec. 2350.

We admit, however, the contention of the petitioner (Br. pp. 22-25), that the mere assertion of an adverse interest by the party in possession of the property does not *ipso facto* deprive the referee of jurisdiction. The referee is vested with the power to determine whether the claim is substantial or merely colorable, frivolous or baseless. But if the adverse interest asserted by the party in possession of the property is found to be substantial and not colorable, the jurisdiction of the referee thereupon terminates. A plenary suit must then

be instituted. In fact, this principle is admitted by the petitioner in his brief (p. 20). The principle is well settled.

May v. *Henderson*, 268 U. S. 111;
In re Selfridge, 33 F. (2d.), 800 (D. C. Mass. 1929);
Shea v. *Lewis*, 206 Fed. 877 (C. C. A. 8th, 1913);
Board of Education v. *Leary*, 236 Fed. 521 (C. C. A., 8th, 1916);
Priest v. *Weaver*, 43 F. (2nd.), 57 (C. C. A. 8th, 1930);
Johnston v. *Spencer*, 195 Fed. 215 (C. C. A. 8th, 1912);
Gamble v. *Daniel*, 39 F. (2d.), 447 (C. C. A. 8th, 1930).

It would appear from the record in the case at bar that the referee found that the respondent had no adverse claim to the balance in the demand loan account (*supra*, p. 7; R. 21), and that upon this point the Circuit Court of Appeals has apparently approved his findings (R. 40).

We submit that the finding of the referee and the statement in the opinion of the Circuit Court of Appeals in this respect are erroneous.

The record upon which this finding is based is of course an *ex parte* record made up wholly of testimony and exhibits introduced by the trustee, and presenting only that side of the case which is most adverse to respondent. Respondent's counsel, relying (rightly or wrongly) upon their preliminary motion attacking the referee's jurisdiction, withdrew from the hearing; and the record consequently contains none of the evidence, and none of the explanations which might have been elicited by cross examination, upon which respondent's defense on the merits is based. Yet even upon the record as it stands (that is, upon the trustee's own uncontradicted version) we submit that a showing has been made of an adverse claim sufficient to oust the jurisdiction of the referee.

In this connection it should be noted that the referee's findings in this case are not based upon conflicting testimony, but are merely inferences from facts which (upon this record) must be taken as uncontradicted. In such a case there is no ground for applying the ordinary rule that an appellate court will defer to the findings of the original trier of the facts who saw the witnesses and was in a position to gauge their credibility. As was said in *In re Solof*, 2 F. (2d) 130, 132 (C. C. A. 9th):

> "No doubt, findings by a referee in bankruptcy are presumptively correct and will not be disturbed, unless they are clearly against the weight of the evidence, or some obvious error of law has intervened in its application. This rule, however, has little application to inferences to be drawn from admitted facts."

Cf. Walter v. *Atha*, 262 Fed. 75 (C. C. A. 3rd).

The principle enunciated in the foregoing cases is particularly applicable to the case at bar, since here the referee's "finding" upon the claim of adverse interest was in reality a conclusion or inference of law, going to the question of his jurisdiction, which is always open to review.

Throughout this litigation it has been constantly stated that the balance in the demand loan account claimed by the petitioner was accumulated by the respondent subsequent to the date of adjudication of the bankrupt, namely December 10, 1929. For instance, that fact was alleged by the trustee in paragraph 8 of its answer (R. 6). The evidence presented to the referee in the hearing on the petition for reclamation emphasizes the same fact. (R. 12, 14). As pointed out, *supra*, at page 7 the referee stated in his findings that the balance was "accumulated by Herbert S. Daniel as receiver subsequent to February 12th, 1930" (R. 21). And the Circuit Court of Appeals, in its opinion, proceeded upon the same assumption.

The petitioner's brief in this Court pursues the same argument, stating in the heading at page 25:

> "A claimant cannot acquire an adverse interest in property belonging to the bankrupt's estate that comes into his possession after adjudication in bankruptcy."

Again at page 73 it is stated that "deposits made *after* the filing of bankruptcy can never be used as a setoff". Similarly at page 75 it is stated that "in the case at bar, the money was collected long after bankruptcy when no right of setoff could attach".

Yet it appears beyond question from the record that the respondent on November 25, 1929, held certain mortgages as collateral for advances amounting to $156,700 which it had already made to the bankrupt. At no time subsequent thereto did the bankrupt deposit additional mortgages. The various amounts of money collected by the respondent as the mortgages were sold were merely a transformation of the collateral. Whatever rights the respondent possessed had their inception at a time not only prior to the adjudication of the bankrupt but also prior to the filing of the petition in bankruptcy. This appears from Exhibit A filed by the petitioner in the referee's proceedings (R. 18-19). A correct understanding of the nature of the demand loan account maintained by the bankrupt with the respondent (see *supra*, pp. 8, 24) renders irrelevant much of the argument presented by the petitioner in his brief.

The record, even as prepared in the absence of the respondent, discloses the existence of a *bona fide* adverse interest of the respondent in the balance in the demand loan account. The referee in bankruptcy is bound to inquire whether the party in possession of the property has an adverse interest (*Remington on Bankruptcy*, Vol. 5, Sec. 2438). And in this inquiry the referee is to consider not only the pleadings but the entire record. This follows by force from the established principle that a referee is not precluded from proceeding to determine whether an adverse

interest alleged in the pleadings by the party in possession is substantial or merely colorable.

May v. *Henderson*, 268 U. S. 111;
In re Radley Steel Construction Co., 212 Fed. 462 (D. C. E. D. N. Y. 1914);
Matter of Yorkville Coal Co., 211 Fed. 619 (C. C. A. 2d., 1914);
First Nat. Bank v. *Hopkins*, 199 Fed. 873 (C. C. A. 5th, 1912).

If the determination of the existence of an adverse claim must be made from the whole record, it is not necessary for the respondent to have asserted its adverse claim in the pleadings. In fact, it appears from the answer of the trustee that the respondent asserted an adverse claim in the balance in the demand loan account. The trustee, at the hearing before the referee on the petition for reclamation, asked leave to amend his answer by adding paragraph IX. This amendment was granted (R. 9). The amendment reads as follows:

> "The trustee further alleges that with full knowledge of all the facts alleged in the applican't petition, the applicant ratified and confirmed the sale of said securities *by attempting to impress a lien on the funds belonging to the bankrupt estate on deposit with the applicant, and is estopped to now reclaim said securities from the undersigned trustee.*" (Italics ours.)

But apart from this, it can not be disputed that the respondent at the hearing before the referee did assert an adverse claim in the balance in the demand loan account. After the referee overruled its motion to strike paragraphs 7 and 8 from the answer of the petitioner, counsel for the respondent stated:

> "We will file a dismissal of this reclamation proceeding. In other words, from the very first our position has been that *it has been immaterial whether we keep the*

money in New York under the collateral pledge agreement, or whether we get the bonds. Now if Mr. Daniel, the trustee, is allowed to come in here and in his answer bring up these different issues, and if these other people are allowed to come in this lawsuit, as far as we are concerned, why we will dismiss the action. Now of course there isn't any counterclaim, this isn't the same as a counterclaim, because we are merely asking for the custody of the bonds. Mr. Daniel has no right to come in when we ask for the custody of the bonds, and bring up a new issue" (R. 9). (Italics ours.)

In effect, the dismissal of the reclamation proceeding is an assertion of an adverse claim in the balance in the demand loan account. The petitioner admits that the bonds shipped to Peters Trust Company have never been paid for, and admits that the purchase price was due from the bankrupt estate (R. 5-6). As to this we submit that respondent had two alternatives: *first,* to claim title to the specific bonds and attempt to recover them in the reclamation proceedings; or *second,* to abandon title to them and set off the purchase price against the balance in the demand loan account. It is clear from the action of counsel for the respondent that the respondent was abandoning its claim of title to the bonds sold to the bankrupt and had charged the sale price of such bonds against the demand loan account by virtue of the lien it possessed under the provisions of the collateral loan agreement entered into by the bankrupt at the time it opened the demand loan account with the respondent.

In addition, it plainly appears from Exhibit A filed by the trustee in the hearing before the referee that the respondent did assert an adverse claim in the balance in the demand loan account. It is stated in Exhibit A:

"Excess collateral to loan $3,272.20 against which, however, there was a charge of $23,055.82 representing a claim transferred from Guaranty Company of New York on November 27, 1929" (R. 18).

Again it appears in Exhibit A (R. 19):

"Against the above, however, there is a lien on account of claim assigned November 27, 1929, by Guaranty Company of New York of

Principal	$23,055.82
Interest on above	385.22
Total Debit	23,441.04
March 14, 1930, Balance due Peters Trust Co.	7,783.56
	$31,224.60

We submit, therefore, that a finding by the referee that the respondent had not asserted and did not have any adverse claim to the balance sought by the petitioner, if such is the finding of the referee, is clearly erroneous. The statement appearing in the opinion of the Circuit Court of Appeals (R. 40) is likewise erroneous. The record, as we have seen, conclusively shows the assertion by the respondent of an adverse claim in the balance sought by the petitioner.

Granting that the referee is empowered to inquire into the adverse claim to determine whether it is substantial or colorable, we submit that it cannot be held that the claim of the respondent in the case before this Court was colorable, frivolous or baseless.

It is well settled that a claim in a bankruptcy proceeding is deemed to be substantial when the claimant's contention discloses a fair and reasonable doubt either as to the facts or the law. An adverse claim is considered substantial unless the preliminary inquiry shows that it is so obviously insufficient either in fact or in law as to be plainly without color or merit and to be a mere pretense.

Harrison v. *Chamberlain*, 271 U. S. 191 (1926);
In re Midtown Contracting Co., 243 Fed. 56 (C. C. A., 2d, 1917);
Boyle v. *Gray*, 28 F. (2d) 7 (C. C. A., 1st, 1928);
In re Wood, 278 Fed. 355 (C. C. A. 2d, 1921);
In re Radley Steel Construction Co., 212 Fed. 462 (D. C. E. D. N. Y., 1914).

This Court has succinctly summarized the elementary rules of law controlling the case at bar. In its opinion in the case of *Harrison* v. *Chamberlain*, 271 U. S., at pages 193-195, the Court stated:

"It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant; but resort must be had by the trustee to a plenary suit. *Mueller* v. *Nugent*, 184 U. S. 1, 15; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 24; *Jaquith* v. *Rowley*, 188 U. S. 620, 623; *Schweer* v. *Brown*, 195 U. S. 171, 172; *Galbraith* v. *Vallely*, 256 U. S. 46, 48; *Taubel Co.* v. *Fox*, 264 U. S. 426, 433; *May* v. *Henderson*, 268 U. S. 111, 115; *Board of Education* v. *Leary* (C. C. A.), 236 Fed. 521, 524; *Lynch* v. *Robertson* (C. C. A), 287 Fed. 433, 435, 437. However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding. *Mueller* v. *Nugent, supra*, 15; *Louisville Trust Co.* v. *Comingor, supra*, 25; *Taubel Co.* v. *Fox, supra*, 433; *May* v. *Henderson, supra*, 16; *Board of Education* v. *Leary, supra*, 525; *Lynch* v. *Roberson, supra*, 436."

* * * * * * *

"Without entering upon a discussion of various cases in the Circuit Courts of Appeals in which divergent views have been expressed as to the test to be applied in determining whether an adverse claim is substantial or merely colorable, we are of opinion that it is to be deemed of a substantial character when the claimant's contention 'discloses a contested matter of right, involving some fair doubt and reasonable room for controversy,' *Board of Education* v. *Leary, supra*, 527, in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows

that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense. Compare *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 295; and *Moore* v. *New York Cotton Exchange*, 270 U. S. 593.

In the present case it clearly appears that the validity of the respondent's claim depended upon disputed facts, as to which there was a conflict of evidence, as well as a controversy in matter of law. Its determination involved 'fair doubt and reasonable room for controversy' both as to fact and law. It was therefore substantial, and not merely colorable; and its merits could only be adjudged in a plenary suit."

As a matter of fact, it has been held that a claim may be substantial even though it is fraudulent and voidable.

Mueller v. *Nugent*, 184 U. S. 1, 15 (1901);
Johnston v. *Spencer*, 195 Fed. 215, 220 (C. C. A., 8th, 1912);
Harrison v. *Chamberlain*, *supra*;
Shea v. *Lewis*, 206 Fed. 877 (C. C. A., 8th, 1913);
Boyle v. *Gray*, 28 F. (2d) 7 (C. C. A., 1st, 1928).

Courts have frequently held that the right asserted by a bank to set off a debt against deposits and accounts maintained with it by the bankrupt estate prior to the filing of the petition in bankruptcy is not a colorable and unsubstantial claim and that, therefore, a bankruptcy court does not possess summary jurisdiction to determine the rights in those deposits and accounts.

In re Radley Steel Construction Co., 212 Fed. 462 (D. C. E. D. N. Y., 1914);
In re Boston-Cerrillos Mines Corporation, 206 Fed. 794 (D. C. N. M., 1913);
First National Bank v. *Hopkins*, 199 Fed. 873 (C. C. A., 5th, 1912).

If this Court considers the adverse claim of the respondent not to be colorable, frivolous or baseless, the conclusion

is inescapable that the referee had no jurisdiction to determine the respective rights of the parties in the balance in the demand loan account.

Nor, moreover, could the jurisdiction of the referee be in any way extended or enlarged by consent of the parties. In certain cases parties may by consent vest jurisdiction in a bankruptcy court which it would not otherwise enjoy, for instance, under Sec. 23-b of the Bankruptcy Act. But it should be noted that this consent goes only to the matter of venue and not to the basic jurisdiction of a bankruptcy court or of a referee in bankruptcy.

Sinsheimer v. *Simonson*, 107 Fed. 898 (C. C. A. 6th, 1901);
Kaigler v. *Gibson*, 264 Fed. 240 (D. C. Ga., 1920);
In re Raphael, 192 Fed. 874 (C. C. A., 7th, 1911).

In the latter case the Court stated, with respect to jurisdiction obtained by consent, that:

"Even though the consent set out in this section be deemed necessary under the facts of this case, such consent 'means consent to the tribunal in which the controversy is to be carried on and not to the mode of procedure, which is regulated by general principles of law unless other provision is made.' Sinsheimer v. Simonson, 107 Fed. 898, 47 C. C. A. 51." (p. 876).

Likewise other courts have definitely decided that consent cannot enlarge the basic jurisdiction of a bankruptcy court or of a referee beyond the scope prescribed by law. If a referee in bankruptcy does not by general principles of law possess jurisdiction, he cannot be granted such jurisdiction by the consent of the parties.

In re Ballou, 215 Fed. 810 (D. C. E. D. Ky., 1914);
In re Walsh Brothers, 163 Fed. 352 (D. C. Ia., 1908);
In re Hollins, 229 Fed. 349 (C. C. A. 2d, 1916).

See also,
In re Tarbox, 185 Fed. 985, 986 (D. C. Mass., 1910).

In *In re Ballou, supra,* a petition was filed to review an order of a referee in bankruptcy directing a corporation and its officers to execute and deliver a certain amount of stock to the trustee in bankruptcy. The order was made in a summary proceeding begun by a petition filed with the referee by the trustee and a rule or show cause order issued thereon and was entered after hearing had on the rule or show cause order. The review was sought on the ground that the referee had exceeded his jurisdiction. The trustee, on his part, contended that the corporation and its officers had consented to the jurisdiction. But the court found that consent was not sufficiently shown and, moreover, that in a case of this nature consent could not vest summary jurisdiction in the referee in bankruptcy. The order of the referee was therefore reversed without prejudice to an independent suit. The opinion of the court states the controlling principles of law in a terse and lucid manner. The opinion reads in part (215 Fed. at pp. 814-815):

"The jurisdiction of such a suit is determined by section 23b of the bankrupt act. Under that section this court has jurisdiction of such a suit with the consent of the corporate petitioner, or if the bankrupt could have brought it herein had not bankruptcy ensued, i. e., if diversity of citizenship existed between him and the corporate petitioner and the amount in controversy was in excess of $3,000. Otherwise it can only be brought in the state court.

But though such a suit can be brought in this court with the consent of the corporate petitioner, it cannot be brought before the referee with such consent. The jurisdiction conferred by that section on the district courts cannot be exercised by the referee. Possibly so far as it applies to suits for the recovery of property under section 60, subdivision (b), and section 67, subdivision (e), and section 70, subdivision (e) it can. If so, it can only be because in those other sections jurisdiction is expressly conferred on the court of bankruptcy of such suits, and the referee can exercise such jurisdiction as a court of bankruptcy can. The word 'courts' in section 23b does not include a court of bank-

ruptcy. In Barden v. First National Bank of Howarden, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, Mr. Justice Gray said:

'But the second clause applies both to the District Courts and to the Circuit Courts of the United States, as well as to the state courts. This appears, not only by the clear words of the title of the section, but also by the use, in this clause, of the general words, "the courts," as contrasted with the specific words, "the United States Circuit Courts" in the first and in the third clauses.'

In so far as it applied to District Courts before the abolition of Circuit Courts, it did not apply to them sitting in bankruptcy, and hence it had no application to courts of bankruptcy. It follows that the referee has no jurisdiction of such a suit. It will hardly be maintained that a civil action at law to collect an ordinary undisputed debt or a suit in equity to enforce a specific performance of an undisputed contract can be brought and prosecuted before the referee. If, then, the referee had no jurisdiction of the only remedy which the trustee had, to wit, an independent suit, a fortiori he did not have jurisdiction of a remedy which he did not have, to wit a summary proceeding.

As then the referee did not have jurisdiction of the summary proceeding brought and prosecuted before him independently of consent of the corporate petitioner, he could not acquire jurisdiction with its consent. For it is a fundamental principle that parties cannot confer essential jurisdiction on a court of controversy, if it does not otherwise have it. Of course this does not apply where it is expressly provided that such jurisdiction may be conferred by consent, which is done by section 23b. But the jurisdiction which under that section can be conferred by consent is jurisdiction upon this court not sitting in bankruptcy, and not upon the referee."

Similarly in the case of *In re Walsh Bros., supra*, the District Court stated in its opinion (163 Fed. 352):

"Has a referee in bankruptcy jurisdiction to determine such a controversy, even with the consent of both par-

ties? If the subject matter of a controversy is not within the jurisdiction of a referee, of course, consent will not confer it, and the court upon a petition for review will acquire none except to determine the jurisdiction of the referee. First Nat. Bank v. Title & Trust Co., 198 U. S. 260, 25 Sup. Ct. 693, 49 L. Ed. 1051." (p. 353).

The principles stated in these decisions just discussed are summarized in *Remington on Bankruptcy*, as follows:

> "But this 'consent' confers jurisdiction only in cases where the suit is a plenary suit, or where it is a summary proceedings and the property involved is within the possession of the bankruptcy court or subject to its control, in which latter case even the referee may have jurisdiction. The referee would seem not to possess jurisdiction except in the latter case." (Vol. 5, Sec. 2198).

We submit, therefore, that there can be no force in the contention of the petitioner that the respondent, by the mere act of filing the original reclamation petition, consented to the jurisdiction of the referee to determine rights in the balance of the demand loan account.

The petitioner in his brief at page 33 also presents to the Court as applicable to the case at bar the principle that a bankruptcy court has jurisdiction to adjudicate adverse claims on property in its possession. Conceding the soundness of this principle, we submit that it is irrelevant to the sole issue before this Court, since the property here claimed by the petitioner is not and has never been in the possession, actual or constructive, of the bankruptcy court.

IV.

The referee exceeded his power in ordering the respondent forthwith to pay over to the trustee a certain sum of money.

Assuming *arguendo* that the referee was justified in denying the respondent's motion to strike paragraph 8 from the answer of the trustee, and that the claim of the petitioner is not for the recovery of an alleged debt but is a claim for property in tangible form in the possession of the respondent, and assuming further that the referee was not in error in finding that the respondent had no adverse interest in such property, we submit that the referee nevertheless exceeded his authority in ordering the respondent to pay over a certain sum of money to the petitioner.

At most, the referee had jurisdiction to consider the counterclaim only as a shield and not as a sword. To the extent that the counterclaim asserted by the trustee exceeds the amount claimed by the respondent in its petition for reclamation, the trustee is required to seek his remedy in a plenary action.

> *In re Continental Producing Co.*, 261 Fed. 627 (D. C. Calif., 1919);
> *In re Peacock*, 178 Fed. 851 (C. C. N. C., 1910);
> *Fitch* v. *Richardson*, 147 Fed. 197 (C. C. A., 1st, 1906).

The rule is well stated in *Remington on Bankruptcy*, Vol. 4, Sec. 1471:

> "Likewise there may be no judgment in the bankruptcy proceeding against the claimant where the estate's offset exceeds the creditors' claim. The trustee must seek his remedy by plenary action.

> And it has been held that the referee may not even adjudicate the offset up to the extent of the creditors' claim, unless the trustee waives the excess; for to do so would render the adjudication res judicata in a subsequent plenary suit to recover the excess; but that the proper practice is for the referee simply to stay the payment of the dividend to the claimant, until the trustee can have his counterclaim adjudicated in plenary action."

If the power of a referee in bankruptcy is restricted in the case of a claim by a creditor for a debt owed by the bankrupt estate, *a fortiori* the same restriction should be applied in the case of a petition for reclamation of specific personal property. The absence of adjudicated cases dealing with a reclamation proceeding does not justify the application of a different principle. In fact a claim by a creditor for a debt owed by the bankrupt estate and a petition to reclaim specific property at the time in the possession of the bankrupt estate are similar, inasmuch as both diminish the estate ultimately distributable to general creditors. The creditor who files a simple proof of claim can be said to have submtted himself to the jurisdiction of the referee to at least as great an extent as the creditor who files a reclamation petition for the recovery of specific property. If the referee cannot enter an affirmative judgment on a counterclaim against the former (and the cases clearly so hold), *a fortiori* he cannot do so against the latter.

The petitioner in his brief at page 74 attempts to escape this rule of law by arguing that the order of the referee is not a money judgment but merely a turnover order, which cannot be enforced by execution but only by commitment for contempt. Yet it remains that the order of the referee inherently carries the determination of the respective rights of the parties in the demand loan account. Such determination is presumably *res judicata*. In fact, it is so claimed by the petitioner in his brief at page 64. Moreover, the decisions uniformly hold such a principle.

In re J. H. Small Shoe Co., 5 F. (2d) 956 (C. C. A. 2nd, 1925). (See cases cited therein at p. 957.)
In re John Osborn's Sons & Co., Inc., 177 Fed. 184, 186 (C. C. A. 2d, 1910).

Although the petitioner in his brief at page 74 seeks to distinguish the effect of the turnover order of the referee from a money judgment, he asserts at page 65 that the petitioner could execute on the turnover order, as on an ordinary money judgment, by garnishment or equitable sequestration of debts owed to the respondent by persons resident in Nebraska. The fundamental lack of jurisdiction of the referee is not cured by issuing a turnover order. We presume that the petitioner is not seeking to uphold the validity of this turnover order if it subsequently serves no effective legal purpose.

In short, the question is not altered in any way by the issuance of a turnover order rather than a money judgment. As we have endeavored to show in the earlier portion of this brief, the referee lacked jurisdiction to determine the facts which formed the basis of the order; and even if he had jurisdiction to determine the facts, he had no jurisdiction to enter an order for affirmative relief.

CONCLUSION.

In concluding, it may not be amiss to consider briefly the relative positions of the parties to this litigation, and the results which would follow if petitioner's argument should be sustained. Petitioner admits that the bonds originally shipped to the bankrupt remain unpaid for, and that there is (or was) a valid claim for the purchase price. We readily admit that if respondent had pressed its reclamation claim to a successful conclusion and had recovered possession of the specific bonds, it could not then have claimed the purchase price as well. A reclamation order giving respondent the bonds would of necessity have required, and

could properly have been conditioned upon, the cancellation of the debit charge for their value, and the restitution to the bankrupt estate of the amount of that charge out of the collateral in the demand loan account.

It would be contrary to natural justice to permit either party to the transaction to enrich itself by retaining both the bonds and the purchase price. But what is the present situation? Petitioner has established his title to the bonds and retains them in the bankrupt estate. In this proceeding he seeks to deny to the respondent not only the right to reclaim the bonds specifically, but also the right to retain or set off the purchase price. Upon petitioner's contention, respondent's remedy was to surrender both the bonds and the purchase price (i. e., the amount of the debit charge made on November 27th, 1929), and to file proof of claim for the purchase price,—a remedy which petitioner gives us to understand is nugatory, since the six months for filing proof of claim has expired.

If petitioner's claim be sustained, and the referee's order affirmed, then of necessity the bankrupt estate will be enriched by retaining both the bonds and the purchase price, unless respondent can establish that the period for filing proof of claim is extended, under Section 57n, by the existence of this litigation.

Rightly or wrongly, respondent filed no proof of claim, since it believed its remedy to be by reclamation or set off. We believe, and the Circuit Court of Appeals has held, that the referee had no jurisdiction to pass upon the validity of that set off, and that petitioner, if he disputes its validity, should be left to his remedy in a hearing on the merits in a plenary suit. If this be correct, and we submit that it is, the decision of the Circuit Court of Appeals should be affirmed. If on the other hand that Court was in error, and the referee had jurisdiction to adjudicate the trustee's claim, we respectfully suggest that this Court should re-

mand the case without prejudice to a full consideration by the referee or the District Court of the equities between the parties.

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals was correct and should be affirmed.

December 3, 1931.

Respectfully submitted,

JOHN W. DAVIS,
THOMAS GARRETT, JR.,
PORTER R. CHANDLER,
CHARLES POLETTI,
Counsel for Respondent.

APPENDIX.

Summary of Demand Loan Account of Peter Trust Company (See R. 18-19 and 41-42.)

November 25, 1929.	Balance due	$156,700.00
	Deposit applied (credit)	31,046.53
	Proceeds of mortgages (credit)	2,500.00
	Net balance due.....	123,153.47
" 27, 1929.	*Assigned account for purchase of bonds (debit)*	*23,055.82*
	Balance due Nov. 27, 1929	146,209.29
December 2, 1929.	Proceeds of mortgages (credit)	72,592.36
	Balance due Dec. 2, 1929	73,616.93
January 17, 1930.	Proceeds of mortgages (credit)	21,213.71
	Balance due Jan. 17, 1930	52,403.22
" 23, 1930.	Proceeds of mortgages (credit)	6,068.75
	Balance due Jan. 23, 1930	46,334.47
February 3, 1930.	Proceeds of mortgages (credit)	10,404.45
	Balance due Feb. 3, 1930	35,930.02
" 11, 1930.	Proceeds of mortgages (credit)	11,072.05
	Balance due Feb. 11, 1930	24,857.97
" 13, 1930.	Proceeds of mortgages (credit)	6,646.25
	Balance due Feb. 13, 1930	18,211.72
March 3, 1930.	Proceeds of mortgages (credit)	19,354.13

(Continued on Next Page.)

		Balance due Peters March 3, 1930		1,142.41
"	4, 1930.	Proceeds of mortgages (credit)		3,588.34
		Balance due Peters March 4, 1930		4,730.75
"	14, 1930.	Proceeds of mortgages (credit)		5,009.93
		Balance due Peters March 14, 1930		9,740.68
		Interest owing by Peters (debit):		
		On demand loan a/c ..	$1,571.90	
		On assigned a/c	385.22	
				1,957.12
		Balance due Peters.....		7,783.56
April	14, 1930.	Draft of trustee paid (R. 12)		7,500.00
		Balance due Peters.....		$ 283.56

NOTE: The amount claimed by the trustee from the Guaranty Trust Company and awarded by the referee's order (R. 22) is $23,724.60. The amount originally debited as an off-set by the Guaranty Trust Company, on account of the bonds sold, is only $23,055.82. The discrepancy between these two figures is thus explained:

Amount debited by Guaranty.....	$23,055.82
Add accrued interest.....	382.22
Add balance admitted to be due to the trustee	283.56
	$23,724.60

The item of $283.56 above mentioned was admitted to be due to the trustee, and was in fact paid to him after the decision of the Circuit Court of Appeals.

SUPREME COURT OF THE UNITED STATES.

No. 179.—October Term, 1931.

Herbert S. Daniel, Trustee of Peters Trust Company, Bankrupt, Petitioner, *vs.* Guaranty Trust Company of New York.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 14, 1932.]

Mr. Justice McReynolds delivered the opinion of the Court.

December 10, 1920, The Peters Trust Company, of Omaha, Nebraska, was adjudged bankrupt by the United States District Court for that State. March 17, 1930, Herbert S. Daniel, petitioner here, became trustee of the estate.

In April, 1930, the Guaranty Trust Company of New York presented to the same court a petition for the reclamation of designated bonds. It alleged that while insolvent and without intent to pay for them the Peters Company had fraudulently ordered and received these bonds from the Guaranty Company of New York; that title thereto had not passed to the Peters Company; that no part of the purchase price had been paid. Also "that on the dates said bonds were shipped by the Guaranty Company of New York, said Guaranty Company of New York, sold, assigned and set over to your petitioner, Guaranty Trust Company, for a valuable consideration, the accounts against the said Peters Trust Company for said bonds, and your petitioner is now the owner of said bonds"; and that they were unlawfully withheld by the trustee. The prayer was "that an order be entered instructing and directing, Herbert S. Daniel, Trustee of said Peters Trust Company, Bankrupt, to deliver to your petitioner the bonds described above and that your petitioner have such other and further relief as may seem just and proper."

The trustee answered. He denied that the bankrupt had acted fraudulently. He asserted that title to the bonds had vested in it and petitioner had no right to recover them.

After such denials and allegations the trustee (Answer, par. 7) stated that customers of the Peters Trust Company had placed orders with it to buy the bonds, that they had an interest in the controversy and should be made parties to the proceeding. Also (par. 8)—.

> "Your trustee further alleges, that the Guaranty Trust Company of New York, the petitioner and applicant herein, has in its possession, on deposit, approximately the sum of $31,224.60 which belongs to the bankrupt estate, and which was accumulated by the Receiver and Trustee of said bankrupt estate since the date it was adjudicated bankrupt. The trustee has made due demand upon the petitioner for delivery of the said money, but the Guaranty Trust Company of New York has refused to deliver the said funds or any part thereof, and should be required to account for all funds collected by it on behalf of the receiver or trustee of Peters Trust Company, Bankrupt, or the bankrupt estate, and be directed to deliver the same forthwith to Herbert S. Daniel, Trustee."

The answer concludes—

> "The trustee further prays for an order directing the Guaranty Trust Company of New York to account to him for all funds collected or now held by it belonging to the bankrupt estate, and be ordered to deliver the same [forthwith] to your trustee, and for such other relief as to the Court may seem just and equitable."

The matter went to the referee. The Guaranty Trust Company moved that paragraphs 7 and 8 be stricken from the answer because they pertained to an issue entirely separate from the one submitted by its petition. This was overruled. Thereupon, counsel for the Trust Company asked that the reclamation proceeding be dismissed, and then withdrew.

The referee took testimony concerning the relationship and dealings among the parties. He found that the reclamation proceedings should be dismissed only insofar as they sought to obtain the securities. Also, "the court further finds that the Guaranty Trust Company has in its hands the sum of $23,724.60 in cash, belonging to Herbert S. Daniel, trustee of the above named bankrupt; that said sum was accumulated by Herbert S. Daniel as

receiver subsequent to February 12th, 1930, said moneys having been collected by said Guaranty Trust Company for and on behalf of said bankrupt estate from the Prudential Insurance Company of America on mortgages made by the bankrupt and sold to the Prudential Insurance Company of America, and that said Guaranty Trust Company has not made herein any claim to the said fund of $23,724.60, and has no claim to the said fund, or to any part thereof, and is merely holding the said sum of $23,724.60 as custodian and agent of Herbert S. Daniel, as trustee of the above named bankrupt, and that said sum should be delivered forthwith to said trustee.'''

The referee's final order directed the trustee to deliver the bonds to specified customers of the Peters Trust Company upon stated conditions, and further "That the Guaranty Trust Company of New York, the applicant herein, be, and it is hereby ordered and directed to forthwith pay over to Herbert S. Daniel, as trustee of the above bankrupt estate, the sum of $23,724.60, of moneys in the hands of said Guaranty Trust Company of New York, belonging to Herbert S. Daniel, trustee of said bankrupt estate, with interest thereon at the rate of 7 per cent annum from this date."

The District Court modified the referee's order as to interest and then affirmed it. The Guaranty Trust Company appealed. The Circuit Court of Appeals upheld the objection offered to the jurisdiction of the referee and upon that ground reversed the District Court. It said—

> . . . . "The petition of appellant for reclamation and the portion of the trustee's answer which asked for affirmative relief were, in fact, petitions by the parties asking the referee to exercise his summary jurisdiction in proceedings in bankruptcy. The two proceedings were quite distinct. Appellant sought to recover certain bonds to which it claimed title. The trustee sought an order that appellant should pay over money of the bankrupt estate received by appellant, after bankruptcy. The proceedings would not have been more unrelated to each other, if the trustee had sought an order on appellant for the delivery of books and papers such as was asked in Babbitt *v.* Dutcher, 216 U. S. 102, or an order for the examination of witnesses such as was asked in Elkus, Petitioner, 216

U. S. 115. We have been cited to no authority for the proposition that a creditor or other petitioner asking specific relief against a bankrupt's estate, as provided by the Bankruptcy Act, thereby becomes subject to summary orders by the referee in matters entirely disconnected from the subject matter of such claim or petition, and no such authority is believed to exist."

The conclusion of the Circuit Court of Appeals is correct and its decree must be affirmed.

In the circumstances, Did the referee have jurisdiction to enter the turnover order against the Trust Company? The answer must be "No" unless that Company by filing its petition for reclamation entered its general appearance and in effect consented to submit itself to summary proceedings before that officer in respect of matters having no immediate relation to the claim which it had presented.

In practice such a rule might lead to unfortunate complications and deprive owners of property of fair opportunity to recover. The risk incident to a general appearance and consent to adjudication of claims of all kinds might easily deter where the right to recover is clear. Moreover, the choice would not be between tribunals merely, but between the ordinary processes in a plenary suit and a summary hearing. We are not cited to any opinion by an appellate court which definitely approves the view advanced by the petitioner. We cannot conclude that the demand for speedy administration of bankrupt estates is enough to justify such a radical departure from ordinary procedure. And the suggestion that it is possible to impose equitable terms as a condition to an order of reclamation is not helpful. No such conditional order was proposed or entered.

The petitioner maintains that read together and properly construed General Order xxxvii and Equity Rule 30 applied in the circumstances and invested the referee with jurisdiction to act as he did.

General Order xxxvii—General Provisions: "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In

proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing."

No. 30, Rules of Practice for the Courts of Equity of the United States, provides—" . . . The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him and such set-off or counter-claim so set up, shall have the same effect as a cross-bill, so as to enable the court to pronounce a final judgment in the same suit on both the original and the cross-claims."

Sec. 2, Bankruptcy Act, grants to bankruptcy courts "such jurisdiction in law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to . . . (7) cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto, except as herein otherwise provided." And Sec. 38 extends to referees "jurisdiction to . . . (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy of their respective districts, except as herein otherwise provided;"

Counsel for petitioner assert: Bankruptcy proceedings constitute a branch of equity jurisdiction; a court sitting in bankruptcy is a court of equity. *Fidelity Trust Company* v. *Gaskell* (8th C. C. A.), 195 Fed. 865, 871. Remington on Bankruptcy, Vol. 1, p. 48, Sec. 23.

And then they say: "Obviously, except as the privilege of modification is granted to facilitate speedy hearings, the rules of equity practice are applicable, without limitation or reservation, to all equitable proceedings in courts of bankruptcy," including of course summary proceedings before referees.

Without regard to other objections to the reasoning offered to support petitioner's view, it is obviously unsound unless the words "proceedings in equity", in General Order xxxvii apply to summary proceedings before a referee like those here in question. And we think no such intendment can be attributed to them.

This Order contains general provisions designed to bring about prompt settlement of bankrupt estates. To that end it directs that in proceedings in equity and at law instituted for the purpose of carrying the Bankruptcy Act into effect and enforcing rights and remedies given thereby, the rules which govern practice in equity and law courts shall be observed, but that the judge may modify them "so as to facilitate a speedy hearing."

Many of the equity rules are inapplicable to summary proceedings before referees. Such proceedings are not in equity as that term is commonly understood. General Order iv—Conduct of Proceedings—uses the words "Proceedings in bankruptcy" when referring to the practice to be followed by Bankruptcy courts—other orders use the word "proceedings".

The distinction between summary proceedings and plenary suits is adverted to in *Weidhorn* v. *Levy*, 253 U. S. 268, 271, 273. There it is also suggested that "proceedings in equity" and "proceedings at law", as used in General Order xxxvii, refer to something other than "proceedings in bankruptcy".

Our conclusion accords with what has been held by other Federal courts. *In re Cunney*, 225 Fed. 426; *International Harvester Co.* v. *Carlson*, 217 Fed. 736, 739; *In re Hughes*, 262 Fed. 500; *Bradley* v. *Huntington*, 277 Fed. 948; *In re Kenney & Greenwood*, 23 F. (2d) 681.

The decree of the Circuit Court of Appeals is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.